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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

TYRONE BROOKS, LANETT STANLEY, BILLY McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, and ERCEL BALDWIN,

Appellants,

versus

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether, in a suit brought by minority plaintiffs to compel compliance with the preclearance provisions of the Voting Rights Act, 42 U.S.C. §1973c, a district court may, after an objection on the merits has been entered by the Attorney General under Section 5 of the Act to statutes creating superior court judgeships elected at-large under majority vote and numbered post requirements, stay the effectiveness of that objection and allow the State to seek alternative, judicial preclearance free of any consequences of its violation of law.

2. Whether a district court may permit a state to continue implementation of unenforceable judicial statutes, including permitting incumbents to remain

indefinitely in unprecleared judgeships and allowing the appointment of new judges to unprecleared vacancies, after an objection has been entered by the Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

PARTIES

All parties to the proceeding below are listed in the caption on the cover.

TABLE OF CONTENTS

Questions Presented.....i

Parties to the Proceeding Below.....ii

Table of Contents.....iii

Table of Authorities.....iv

Opinions Below.....1

Jurisdiction.....2

Statutory Provision Involved.....3

Statement of the Case.....4

The Unprecleared Judicial Election Statutes.....4

The Administrative Preclearance Process: Round One.....7

The Administrative Preclearance Process: Round Two.....12

The Questions Are Substantial.....18

I. The District Court's Order Vacating All But Prospective Relief Wholly Subverts Congress' Intent in Enacting the Preclearance Requirements of the Voting Rights Act.....21

II. Federal Courts Are Required To Grant Injunctive Relief After An Objection On the Merits By the Attorney General.....27

III. The Remedy Required Is An Order Declaring the Unprecleared Judicial Positions Unenforceable And Vacant.....32

Conclusion.....35

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TABLE OF AUTHORITIES

Allen v. State Board of Elections, 393 U.S. 544 (1969).....10, 19, 31

Berry v. Doles, 438 U.S. 192 (1978) 10, 28, 29, 30

Canady v. Lumberton City Board of Education, 454 U.S. 957 (1981) 18, 20, 27, 32

City of Richmond v. United States, 422 U.S. 358 (1975).....31

City of Rome v. United States, 446 U.S. 156 (1980).....14, 33

Georgia v. United States, 411 U.S. 526 (1973).....20, 32

Haith v. Martin, 618 F.Supp. 410 (E.D.N.C. 1985)(3 judge), summarily aff'd, 477 U.S. 901 (1986).....6, 31

Hathorn v. Lovorn, 457 U.S. 255 (1982).....19

Holt v. City of Richmond, 406 U.S. 903 (1972).....20, 27, 33

Lucas v. Townsend, 486 U.S. 1301 (1988).....27

McCain v. Lybrand, 465 U.S. 237 (1984).....10, 20, 22, 32

NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985).....10, 29, 30, 34

NAACP v. New York, 413 U.S. 345 (1973).....25

Perkins v. Matthews, 400 U.S. 379 (1971).....19, 21, 28, 29, 30, 34

South Carolina v. Katzenbach, 383 U.S. 301 (1966).....11, 19, 21, 22

Thornburg v. Gingles, 478 U.S. 30 (1986).....14

United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978).....10

Upham v. Seamon, 456 U.S. 37 (1982).....34

Statutes, Rules & Regulations:

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973.....8, 9

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c.....passim

28 U.S.C. §1253.....3

28 U.S.C. §2284.....3, 9

28 C.F.R. §51.37.....7

28 C.F.R. §51.40.....8

Other Authority:

House Rep. No. 439, 89th Cong. 1st Sess. (1965).....25

H.R. Rep. No. 97-227, 97th Cong. 2d Sess. (1982).....25

Senate Rep. No. 162, 89th Cong. 1st Sess. (1965).....25

S. Rep. No. 97-417, 97th Cong. 2d Sess. (1982).....25

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

TYRONE BROOKS, et al.,

Appellants,

vs.

GEORGIA STATE BOARD OF ELECTIONS, et al.,

Appellees.

OPINIONS BELOW

The memorandum opinion and order of the three-judge panel of the United States District Court for the Southern District of Georgia granting plaintiffs summary judgment and interim injunctive relief on the issue of whether or not the creation of elected judgeships is a covered change under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, is unreported and is reproduced in the separately bound appendix at 1a.

The order of May 29, 1990 which granted defendants' motion for reconsideration, modifying portions of the court's injunctive order, is unreported and is reproduced at 86a. A previous order denying defendants' motion for reconsideration without prejudice is reproduced at 84a.

The corrective order further modifying the injunctive relief, entered June 25, 1990, is reproduced at 96a.

The order denying plaintiffs' motion for a stay pending appeal is reproduced at 101a. All of these orders are unreported.

JURISDICTION

This is an appeal from the orders of a three-judge district court permitting continued implementation of statutes creating elected superior court judgeships. The statutes have not been

precleared as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c. The three-judge court was convened pursuant to 28 U.S.C. §2284, as required by 42 U.S.C. §1973c. A final order was entered on May 29, 1990. Appellants' notice of appeal was filed June 14, 1990 in the district court. 99a.

This Court is authorized to hear this appeal by 28 U.S.C. §1253 and 42 U.S.C. §1973c.

STATUTORY PROVISION INVOLVED

This appeal involves Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c. The text of this section is reproduced at 125a.

STATEMENT OF THE CASE

The Unprecleared Judicial Election Statutes. Between 1965 and 1988, Georgia enacted statutes creating 77 judgeships of the superior court, as well as five new circuits. These statutes created the positions, prescribed the method of election, and (in the case of the new circuits) changed the boundaries of the election districts.

With these statutory additions, there are 45 judicial circuits in the State of Georgia from which superior court judges are elected. Although the state is 26.8% black, each of the 45 circuits has a majority white voting age population. Circuits are composed of one to eight counties. Superior court judges in Georgia are elected at-large by all electors within the judicial circuit, using numbered posts and a majority vote

requirement. Only five of the 135 sitting superior court judges are black.

Georgia is a covered jurisdiction under the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. Any change in a standard, practice or procedure with respect to voting is required by the Act to be precleared by the Attorney General of the United States or the District Court for the District of Columbia before the change may be lawfully implemented.

Despite this requirement, Georgia implemented each of the 77 statutes at issue without first obtaining preclearance. Positions were established, judges were appointed, elections were conducted and vacancies were filled, all without complying with Section 5.

On June 23, 1986, this Court determined that changes in the number and

the manner of election of judges are changes requiring preclearance under Section 5 of the Voting Rights Act. Haith v. Martin, 618 F.Supp. 410 (E.D.N.C. 1985) (3 judge), summarily aff'd 477 U.S. 901 (1986). However, Georgia continued its implementation of its unprecleared judicial statutes, filling ten additional positions and holding judicial elections in 1986 and again in 1988. All of the unprecleared judgeships are held by incumbents who were appointed or elected after Haith v. Martin was decided.

It was not until June 27, 1988 that the State submitted any of the judicial election changes for preclearance. Presented, by law, with a choice between administrative preclearance (through the Attorney General) and judicial preclearance (in the District Court for the District of Columbia), the State chose to

submit the changes to the Attorney General.

The Administrative Preclearance Process: Round One. On August 26, 1988, the Attorney General precleared 30 of the judgeships and three of the five new circuits. As to the remaining 48 judgeships and two judicial circuits, the Attorney General (in accordance with 28 C.F.R. §51.37) requested that the State provide additional information, to enable him "to determine that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race of color." 116a. Instead of providing the requested information, the State unilaterally decided not to comply with the preclearance requirements, and so advised the Attorney General. On June 16,

1989, the Attorney General interposed an objection to "the further implementation of the changes concerning the election of superior court judges," consistent with the regulations, which provide that failure to complete the submission may result in objection. 28 C.F.R. §51.40. 119a.

Plaintiffs, who are black citizens and registered voters of Georgia and who had filed suit on July 13, 1988, challenging the implementation of statutes creating new superior court judgeships and circuits in Georgia without first obtaining preclearance under Section 5,[1]

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[1] Plaintiffs also challenged the method of electing superior court judges (both those created prior to the effective date of the Voting Rights Act and the unprecleared judicial statutes) as violative of Section 2 of the Act, 42 U.S.C. §1973, and the first, thirteenth,

moved for a preliminary injunction and summary judgment. A three-judge district court was convened pursuant to 28 U.S.C. §2284 and 42 U.S.C. §1973c. On December 1, 1989, the court held that the addition of judgeships was a covered change under Section 5, and that Georgia had implemented 48 judgeships between 1964 and 1988 without first obtaining preclearance. Accordingly, it entered an order granting plaintiffs' motion for summary judgment.

In weighing what preliminary relief to enter, the court noted that

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(Footnote 1 cont.)

fourteenth and fifteenth amendments to the United States Constitution. None of these claims has been decided below and none present any issue for decision in this appeal. Proceedings in the Section 2 portion of the case were stayed pending resolution of the Section 5 claim.

> We would do violence to the heart of Section 5 if we were to excuse the State's failure to seek preclearance merely because the State has been disregarding Section 5 for a long time. Moreover, Supreme Court precedent in this area is unambiguous. Allen v. State Board of Elections, 393 U.S. 544, 571, 89 S.Ct. 817, 834; United States v. Sheffield Board of Commissioners, 435 U.S. [100,] 136, 98 S.Ct. at 981; McCain v. Lybrand, 465 U.S. [237,] 249-51, 104 S.Ct. at 1045-46. Section 5 means what it says: absent preclearance, a covered change may not be enforced.

32a-33a. Relying on Berry v. Doles, 438 U.S. 192 (1978) and NAACP v. Hampton County, 470 U.S. 179 (1985), the court first gave the defendants thirty (30) days within which to comply fully with the Attorney General's request for additional information. In the event defendants failed to do so or the Attorney General entered an objection on the merits, the court concluded that it "must afford some affirmative relief." 40a. Rejecting the State's argument that the court was

drastically expanding the law, the court explained,

> Section 5 is a drastic remedy imposed on the states to remedy extraordinary wrongs.

29a.[2] See also South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966) (referring to Section 5 as an "uncommon exercise of congressional power").

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[2] The court also noted that the State itself was responsible for the brink on which it stood:

> ...the State has pointed to no authority to suggest that Section 5 does not apply to the election of judges, nor has the State been able to show that the addition of judges is not a covered change within the scope of Section 5. By the same token, the State has failed to adduce any precedent that might justify its deliberate decision not to comply with the Attorney General's request for information, a decision that has forced us ineluctably to take the steps we have here.

45a.

Despite its recitation of strong Supreme Court precedent, the relief the court afforded was limited.[3] It enjoined any further elections or appointments to unprecleared positions. However, the court declined to declare the judgeships void "until the date of the next scheduled election" for the position (in some cases, more than two years hence), exercising what it believed to be its "equitable discretion to permit incumbents to serve out their full terms," even in the event preclearance were denied. 41a.

The Administrative Preclearance Process: Round Two. As a result of the court's December 1, 1989 order, the State

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[3] Even the dissenting member of the court characterized the remedy as a "relatively mild form of relief." 76a.

provided supplemental information to the Attorney General,[4] and submitted statutes from the 1989 and 1990 legislative sessions, creating ten (10) additional judgeships, for preclearance. It also immediately moved for reconsideration, which was denied without prejudice pending the Attorney General's decision. 84a.

On April 25, 1990, the Attorney General entered an objection on the merits to each of the 58 additional superior court judgeships, holding that the State

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[4] Although it submitted the requested information to the Attorney General, Georgia took no action to correct the objectionable features of the method of electing judges at its annual legislative session, which commenced in January of 1990. Instead, it added five new judgeships, elected using the same election features. To date, the State has not taken any action to cure the violations found by the Attorney General in his letter of April 25, 1990.

had not "carried its burden of showing that the expansion of an electoral system, which includes the restrictive majority vote and designated post features, through the additional judgeships" had "neither a discriminatory purpose nor a discriminatory effect." 110a, 111a. Specifically, the Attorney General found that

> the majority vote and designated post requirements...acting in tandem, tend to minimize black voting strength in an at-large system. See, e.g., City of Rome v. United States, 446 U.S. 156 (1980). Indeed, there is substantial information indicating that the majority vote requirement was adopted in 1964 by the state precisely for that invidious purpose; the designated post requirement was adopted in the same legislation...
>
> In addition, the state has not shown how its interests are served by circuit-wide elections in many of the circuits now at issue where the at-large election feature is in apparent violation of Section 2 of the Voting Rights Act. Thornburg v. Gingles, 478 U.S. 30 (1986).

108a-109a.

The State renewed its motion for

reconsideration, asking that the judges be permitted to remain in office while the State (having been denied preclearance by the Attorney General) sought judicial preclearance in the District Court for the District of Columbia. The motion was opposed by the plaintiffs and by the United States, appearing as amicus curiae.

On May 29, 1990 the court modified its remedial order, vacating all aspects of its previous remedy other than prospective injunctive relief.[6] The new order permits sitting judges to remain in unprecleared offices indefinitely, beyond the end of their terms, and allows the

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[6] The order bars any elections for the unprecleared posts (elections for 1990 were cancelled), and prevents the state from implementing the ten (10) newly enacted, but not yet implemented, judgeships.

State to fill any vacancies in these judgeships by appointment until a new electoral scheme is precleared and implemented. Even in the event preclearance is denied by the District Court for the District of Columbia, the unprecleared judges are to continue to serve for five additional months (150 days). 89a. Finally, the State was given 90 days, until September 23, 1990 merely to file its declaratory judgment action. 97a-98a.[7] The sole ground given by the court for the modification was to "assure that the defendants will be able to seek judicial review of the statutes without

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[7] The State has not rushed to file suit. At the time of filing this jurisdictional statement, more than three months have elapsed since the Attorney General's objection and no suit has been filed in the District Court for the District of Columbia.

the risk of serious disruption of Georgia's judiciary." 88a.

Plaintiffs filed a notice of appeal on June 14, 1990, together with a motion for stay, which was denied on June 22, 1990. That same day, defendants filed a notice of appeal. Plaintiffs' Application for Injunction Pending Appeal was denied by Justice Kennedy on July 13, and is currently pending before Justice White.

THE QUESTIONS ARE SUBSTANTIAL

Never before has a court been permitted to stay the effectiveness of an objection entered by the Attorney General under Section 5 of the Voting Rights Act.[8] By removing all affirmative relief after an objection on the merits, to allow Georgia to seek seriatum what Congress designed as an alternative method of preclearance, the district court "shift[ed] the advantage of time and inertia from the perpetrators of the evil

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[8] Only once before has a court even entered such an order. In Canady v. Lumberton City Board of Education, 454 U.S. 957 (1981), the three-judge court allowed defendants to enforce previously objected-to annexations while they sought reconsideration from the Attorney General. This Court granted plaintiffs an injunction pending appeal, essentially reversing the district court, and holding the annexations to which the Attorney General had objected unenforceable in pending elections.

[of discrimination in voting] to its victims," South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966), contrary to both the intent of Congress in adopting Section 5 and to the holdings of this Court.[9]

The commands of the Voting Rights Act are unambiguous. Unprecleared voting changes are null and void. Hathorn v. Lovorn, 457 U.S. 255, 270 (1982); Perkins v. Matthews, 400 U.S. 379 (1971); Allen v. State Board of Elections, 393 U.S. 544, 572 (1969). If the jurisdiction and the voting practices are covered by Section 5, and if there has been no preclearance, the voting changes may not continue to be

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[9] Georgia is entitled to pursue both preclearance avenues. However, having received an objection form the Attorney General, they are not entitled to a stay of that objection while pursuing judicial preclearance.

enforced. McCain v. Lybrand, 465 U.S. 236, 245 (1984); Georgia v. United States, 411 U.S. 526, 541 (1973); Canady v. Lumberton City Board of Education, 454 U.S. 957 (1981); Holt v. City of Richmond, 406 U.S. 903 (1972).

The district court was required to enforce the Voting Rights Act and grant affirmative relief to plaintiffs. It had no discretion to permit continued implementation of the unprecleared statutes after an objection by the Attorney General. Its order, if permitted to stand, will seriously undermine future compliance with the requirements of Section 5, by removing any incentive to preclear covered voting changes. Review and reversal by this Court are urgently required.

I. THE DISTRICT COURT'S ORDER VACATING ALL BUT PROSPECTIVE RELIEF WHOLLY SUBVERTS CONGRESS' INTENT IN ENACTING THE PRECLEARANCE REQUIREMENTS OF THE VOTING RIGHTS ACT

Section 5 of the Voting Rights Act was designed to "shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims." South Carolina v. Katzenbach, 383 U.S. 301, 328; Perkins v. Matthews, 400 U.S. 379, 396 (1971). Finding that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and emergy required to overcome the obstructionist tactics invariably encountered in these lawsuits," Congress exercised its authority under the Fifteenth Amendment to "prescribe[] remedies for voting discrimination which go into effect without any need for prior

adjudication." Id., at 327-28. Accord, McCain v. Lybrand, 465 U.S. 236 (1984).

The most stringent of these remedies is the preclearance requirement. No covered jurisdiction may implement any change affecting voting without first demonstrating to the satisfaction of either the Attorney General or the United States District Court for the District of Columbia that the proposed change does not have the purpose, and will not have the effect, of discriminating against minority voters. 42 U.S.C. §1973c.

Voluntary compliance with the preclearance provisions is key to its operation as an effective protection of minority voting rights. It is crucial, therefore, that when jurisdictions violate Section 5, and implement covered changes without preclearance, the consequences are swift and sure. As the district court

noted in its December 1, 1989 opinion, Supreme Court precedent to date has made it plain that "Section 5 means what it says: absent preclearance, covered changes may not be enforced." 33a.

The district court's order vacating all affirmative relief, and permitting continued and indefinite implementation of unprecleared judgeships, cuts out the very core of Section 5. The order sanctions the state's violation, and insulates Georgia from any consequences of its illegal implementation. The very gravaman of the State's request for reconsideration of the preliminary injunction was that if the law were enforced, the State would be disadvantaged in litigation. The State argued that if the court did not protect the State by keeping the judges in office no matter what the State did or how slowly it moved, the State might feel required to

"capitulate" to the ruling of the Attorney General of the United States.[10]

The order of May 29, 1990 which directed that the unprecleared judicial offices shall continue indefinitely removes any incentive to the State to cease the violation or adopt a method of election that does not violate Section 5.

The three-judge court improperly

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[10] Despite its argument to the court that the State might feel compelled to capitulate if faced with the consequences of its actions, the state attorney general took the public position that they would litigate no matter what. At a press conference held the day after the Attorney General entered his objection on the merits, the State vowed to "spend whatever it takes to defend its system of electing Superior Court judges even if it means putting 25 or more sitting judges out of work." Georgia's Attorney General Michael Bowers was quoted as saying, "It could last for years. Is it worth a million dollars? Five million? I say yes." The Union Recorder, Friday, April 27, 1990, p. 3A.

placed the burden of voting rights enforcement back upon minority plaintiffs. This action is contrary to the Congress' intent as expressed in not only the 1965 Act, but also the 1970, 1975 and 1982 extensions. NAACP v. New York, 413 U.S. 345, 354 (1973)["voting restraints on account of race or color should be removed as quickly as possible in order to 'open the door to the exercise of constitutional rights conferred almost a century ago,'" quoting House Rep. No. 439, 89th Cong. 1st Sess. 11 (1965)], see also, Senate Rep. No. 162, pt. 3, 89th Cong. 1st Sess. 6-7 (1965); H.R. Rep. No. 97-227; S. Rep. No. 97-417, 97th Cong. 2d Sess. 5 (1982). Congress intended that submitting authorities -- not minority voters -- bear the burden of delay and disruption resulting from the actions of the states.

Equally fundamental, the order relegates the administrative preclearance process to a "second class status," and treats the Attorney General's objection, entered after careful review of materials submitted by both parties over a 23 month period, as a nullity. There is no basis either in the Act or judicial interpretation for such a de facto "stay" of the Attorney General's objection on the merits. Denial of administrative preclearance has the same legal effect, and is as fully binding as, denial of preclearance by the United States District Court for the District of Columbia. The court had no more authority to stay the Attorney General's objection than to stay an order of the District Court.

The district court's order of May 29, 1990 destroys any incentive a covered jurisdiction might have to comply with the

preclearance requirements of Section 5. The reward for violating the Act is to be permitted to continue to violate the Act. Because this order undermines the entire Congressional scheme for voting rights enforcement, the order should be reversed.

II. FEDERAL COURTS ARE REQUIRED TO GRANT INJUNCTIVE RELIEF AFTER AN OBJECTION ON THE MERITS BY THE ATTORNEY GENERAL

What constitutes an appropriate remedy for a Section 5 violation varies according to whether the change has been implemented and whether the jurisdiction has sought preclearance.

This Court has consistently granted applications for stay of a Voting Rights Act violation presented prior to implementation. See, e.g., Holt v. City of Richmond, 406 U.S. 903 (1972); Canady v. Lumberton City Board of Education, 454 U.S. 957 (1981); Lucas v. Townsend, 486

U.S. 1301 (1988). The district court here correctly followed these precedents, and enjoined any implementation of the ten newest judgeships.

After an unprecleared change has been implemented, a court must exercise its discretion to determine the appropriate remedy. While an unprecleared change is presumed void, this Court has authorized district courts to consider, in formulating relief, such factors as "the nature of the changes complained of, and whether it was reasonably clear at the time of [implementation] that the changes were covered by Section 5." Perkins v. Matthews, 400 U.S. 379, 396 (1971). In some instances, it is appropriate to allow the covered jurisdiction thirty (30) days within which to apply for preclearance before imposing affirmative relief. See, e.g., Berry v. Doles, 438 U.S. 190, 192-93

(1978); N.A.A.C.P. v. Hampton County Election Commsn, 470 U.S. 166182 (1985).[11]

However, once a jurisdiction has been given the opportunity to obtain preclearance and either declines to do so or is denied preclearance, this Court has consistently required that full injunctive relief be granted, and the results of the illegal implementation undone. NAACP v. Hampton, supra, 470 U.S. at 182-83 ("If appellees fail to seek this approval, or if approval is not forthcoming, the

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[11] This Court has affirmed such limited relief where there were questions as to coverage (Berry v. Doles, Perkins v. Matthews) or a question as to whether preclearance had previously been granted (NAACP v. Hampton). While plaintiffs dispute that there was an open question as to either coverage or prior preclearance in the instant case, they do not here challenge the district court's decision to afford defendants thirty (30) days within which to complete their Section 5 submission.

results of the March 1983 election should be set aside"); Perkins v. Matthews, 400 U.S. 379, 397 (1971)(ordering a new election if local officials fail to seek preclearance or if the required federal approval is not forthcoming). See also Berry v. Doles, supra.

Such relief is particularly appropriate here where the Attorney General's denial of preclearance was grounded upon a finding of racial purpose. While "the determination whether a change has a discriminatory purpose or effect... is [ordinarily] distinct from the determination whether the failure to submit the change required that the election be set aside," Hampton, supra, 470 U.S. at 183, n. 36, the Attorney General, in the course of his Section 5 review, has here found "substantial information indicating that the majority vote requirement was adopted

in 1964 by the state...for [the] invidious purpose" of minimizing black voting strength. 108a.[12] As this Court noted in City of Richmond v. United States, 422 U.S. 358, 378 (1975), "an official action, ...taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our

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[12] The existence or absence of a finding of racial purpose was also a factor considered by this court in Allen v. State Board of Elections, 393 U.S. 544, 572 (1969), in determining the appropriate remedy for a Section 5 violation.

Another factor considered in Allen was the state's conduct. Mississippi, this court found, had not engaged in "deliberate defiance of the Act," but had merely raised a coverage issue of first impression, subject to rational disagreement. Id. By contrast, the history of this case is one of recalcitrance and delay. Georgia not only implemented covered changes without preclearance for years after this Court's ruling in Haith v. Martin, but also made a "deliberate decision not to comply with the Attorney General's request for information," without either precedent or authority. 45a.

Constitution or under the [Voting Rights Act]."

The district court, by allowing judges to remain indefinitely in unprecleared positions and by vacating its prior order declaring the positions void in the wake of the Attorney General's objection, has utterly failed to enforce the law. Precedent requires that the remedial order be reversed.

III. THE REMEDY REQUIRED IS AN ORDER DECLARING THE UNPRECLEARED JUDICIAL POSITIONS UNENFORCEABLE AND VACANT

It is now a matter of black letter law that voting practices covered by Section 5 which have not received preclearance may not continue to be enforced. See, e.g., McCain v. Lybrand, supra, 465 U.S. at 245; Georgia v. United States, 411 U.S. 526, 541 (1973); Canady v. Lumberton City Board of Education, 454

U.S. 957(1981); Holt v. City of Richmond, 406 U.S. 903 (1972).

Enjoining the objectionable practice has the result of reinstating the last valid plan in effect (the "status quo ante"). See City of Rome v. United States, 446 U.S. 156, 182 (1980). In the instant case, the judgeships did not exist prior to the enactment of the unprecleared statutes. Under Section 5, the judgeships themselves have no legal validity until the statutes are precleared, so there is no previous election plan to which the State could legally revert for these positions. The appropriate relief, therefore, is to declare all unprecleared positions vacant and void.[13]

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[13] Although the district court initially ordered a form of this relief in the event the Attorney General declined to

In the alternative, if plaintiffs are incorrect in the above, and if the Attorney General's objection is read as merely going to the method of electing these judges and not the positions themselves, the remedy entered by the three-judge court on May 29, 1990 is nonetheless legal error. If the objection is to the majority vote, numbered post and at-large features of the election system, then the proper relief is for the district court to adopt a racially fair interim election plan that squarely meets and cures the objections interposed by the

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(Footnote 13 cont.)

withdraw his objection, it erred in permitting the judges to remain in office until the end of their terms. Once the objection on the merits was entered, Perkins and Hampton require that the judgeships be immediately voided and vacated.

Attorney General. Upham v. Seaman, 456 U.S. 37 (1982). The State itself twice argued - in its Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, at pages 23-24, and in its Response to DOJ Letter of April 25, 1990, at p. 3 - that such a remedy would be appropriate relief. Remanding the case for the adoption of such a plan would more fully protect the interests of the minority plaintiffs than the present order.

CONCLUSION

The three-judge court, in vacating all but prospective injunctive relief after an objection on the merits and permitting judges elected to unprecleared posts under a discriminatory election system to remain in office indefinitely, ordered the least defensible remedy

possible. The order casts the burdens of delay onto the victims of discrimination, promotes time-consuming and expensive litigation, and rewards and encourages non-compliance with Section 5 in clear derogation of Congressional authority and intent. Accordingly, the remedial aspects of the district court's orders must be reversed and the case remanded for the entry of an appropriate and effective remedy.

Respectfully submitted,

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

TYRONE BROOKS, LANETT STANLEY, BILLY McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, and ERCEL BALDWIN,

Appellants,

versus

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

APPENDIX TO JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

Memorandum Opinion and Order of December 1,1989 by 3-Judge Court.....1a

Order of March 26, 1990 Denying Defendants' Motion for Reconsideration of the Remedy Without Prejudice.....84a

Order of May 29, 1990 Modifying Remedial Portion of December 1, 1989 Order....86a

Corrective Order of June 25, 1990.....96a

Plaintiffs' Notice of Appeal to the Supreme Court of Section 5 Claim.....99a

Order of June 22, 1990 Denying Plaintiffs' Motion for Stay.....101a

Letter of Attorney General of April 25, 1990 Objecting on the Merits to Statutes Concerning Election of Superior Court Judges.....102a

Letter of Attorney General of June 16, 1989 Objecting to Further Implementation of Statutes Concerning Election of Superior Court Judges, Due to State's Failure to Provide Requested Information.....115a

28 U.S.C. §1253.....124a

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c.....125a

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

C.A. CV288-146

[Filed December 1, 1989]

TYRONE BROOKS, et al.,	:
	:
Plaintiffs,	:
	:
vs.	:
	:
STATE BOARD OF ELECTIONS, et al.,	:
	:
Defendants.	:

Before KRAVITCH, Circuit Judge, EDENFIELD and BOWEN, District Judges.

MEMORANDUM OPINION AND ORDER

On July 13, 1988 plaintiffs commenced this action alleging violations of sections 2 and 5 of the Voting Rights Act of 1964 (currently codified as amended at 42 U.S.C. §§ 1973 and 1973c, respectively), as well as provisions of the first, thirteenth, fourteenth, and fifteenth amendments to the United States Constitution. The plaintiffs are black

voters of Georgia, some of whom are elected officials of various Georgia counties, suing for themselves and on behalf of those similarly situated.[1]

Defendants do not contest class certification or standing.[2] The defendants are the Georgia State Board of Elections and Max Cleland, Secretary of State and Chairman of the Georgia State Board of Elections.[3] A three-judge district court was convened to consider the alleged violations of section 5 of the Voting Rights Act. See 42 U.S.C. § 1973c; 28 U.S.C. § 2284. Currently before the court is plaintiffs' motion for summary judgment and injunctive relief.

I.

Since August 7, 1965 Georgia has been a "covered jurisdiction" within the meaning of section 5 of the Voting Rights Act. 28 C.F.R. § 51 app. (1988); 30 Fed.

Reg. 9897 (1965). As a covered jurisdiction, Georgia must administratively preclear "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" with the Attorney General of the United States or institute a declaratory judgment action in the District Court for the District of Columbia. See 42 U.S.C. § 1973c.[4]

From 1964 to 1988, Georgia enacted 80 statutes regarding the election of superior court judges. All told, seventy-seven judgeships and five new circuits were created. The State submitted these to the Attorney General for preclearance on June 27 and 28, 1988. By letter of August 26, 1988 the Attorney General notified the State that he did not object to thirty-one of the proposed changes.

Thus, twenty-nine of the seventy-seven new judgeships and three of the five new circuits were precleared. See Appendix A. In the same letter the Attorney General requested more information regarding the remaining changes.[5] The State submitted some further information, but chose not to comply fully with the Attorney General's request.

In order to obtain preclearance under section 5 of the Voting Rights Act, the State, as the submitting authority, has the burden of showing that a submitted change has neither a discriminatory purpose nor effect. See e.g., Georgia v. United States, 411 U.S. 526, 93 S.Ct. 1702, 36 L.E.2d 472 (1973). Because the State deliberately chose not to comply with the Attorney General's request for further information regarding the changes, the State failed to meet its burden under

section 5. Accordingly, on June 16, 1989 the Attorney General notified the State that he objected to the addition of the forty-eight judgeships and the redistricting of two circuits with respect to which he had earlier requested information. See Appendix B.

The statutes to which the Attorney General has objected fall into three broad categories. First, two new judicial circuits are created. Second, some circuits that previously had only one superior court judgeship are given one or more additional judgeships. Third, certain circuits that had previously had more than one superior court judgeship are given one or more additional judgeships.

In 1989 the State General Assembly created six more superior court judgeships. All but one of these was to commence on July 1, 1989. See Appendix C.

The governor has agreed to refrain from nominating anyone to fill these posts pending this court's decision. The remaining judgeship is authorized to commence on January 1, 1990. The State has not yet submitted these changes to the Attorney General for preclearance, nor has the State commenced a declaratory judgment action in the District Court for the District of Columbia as provided by section 5 of the Voting Rights Act.

One of the judgeships created in 1989 has, however, been precleared: the officials of Bartow County submitted the addition of a judgeship to the Cherokee Circuit to the Attorney General for preclearance, and the Attorney General has notified Bartow County that he does not object to the change.

Among other requirements for election, a candidate for a superior court

judgeship must designate the specific opening for which he is seeking election if there is more than one judgeship up for election. In order to be elected, a candidate must receive an absolute majority of votes cast. Judges are elected on a circuit-wide basis. As we discuss below, for the purposes of our opinion we will treat these three requirements as having been precleared within the context of the then-existing electoral scheme. See infra Part III.A.2.

II.

The role of the three-judge court entertaining an action under section 5 of the Voting Rights Act is limited. The three-judge court determines "(1) whether a change [is] covered by § 5, (ii) if the change [is] covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not

satisfied, what remedy [is] appropriate." City of Lockhart v. United States, 460 U.S. 125, 129, 103 S.Ct. 998, 1001 n.3, 74 L.E.2d 863 (1983). The court does not consider the merits of a plaintiff's claim that the proposed changes are discriminatory. United States v. Board of Supervisors, 429 U.S. 642, 97 S.Ct. 833, 51 L.E.2d 106 (1977); Perkins v. Matthews, 400 U.S. 379, 385, 91 S.Ct. 431, 27 L.E.2d 476 (1971). The court may consider any equitable arguments put forth by the defendants or the plaintiffs only in the limited context of fashioning an appropriate remedy. See infra Parts IV and V.

III.

As noted above, the first step for a three-judge court is to determine "whether a change [is] covered by § 5." In this case, that question has two facets.

First, whether, as a general matter, section 5 encompasses changes regarding the election of judges. If section 5 applies to the election of judges, then the next step is to determine whether the specific "changes" at issue in this case are "covered changes," i.e., changes that trigger the application of section 5.[6]

A.

"For possible appeal purposes," the State has "expressly reserve[d] the contention that the election of judges are never covered by Section 5." Because defendants cannot cede jurisdiction to a federal court, and because three-judge district courts are exceptional, this court should consider its jurisdiction as a threshold issue. Cf. Harper v. Levi, 520 F.2d 53 (D.C. Cir. 1975) (statute calling for three-judge district court should be strictly construed).

Courts that have addressed this question have concluded that section 5 applies to the election of judges. See Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), aff'd mem., 477 U.S. 901 (1986); Kirksey v. Allain, 635 F. Supp. 347 (S.D. Miss. 1986) (same).[7]

The Supreme Court's summary affirmance of Haith v. Martin may well have decided this issue. In Haith, the state did not challenge that the changes were changes of a "standard, practice, or procedure with respect to voting," but the state did argue that section 5 did not apply to the election of judges. 618 F.Supp. at 414. The state also argued that equitable principles excused the state's failure to preclear because earlier the state nad submitted the changes for preclearance and the Justice

Department had informed the state that the changes at issue were not within the scope of section 5. Id.

The three-judge court concluded that section 5 encompassed the election of judges, and found that the proposed changes to the election of superior court judges had not been precleared as section 5 required. Id. at 412-13. The court also concluded that section 5 did not empower the court "to provide equitable relief to defendants, no matter how just their cause." Id. at 414.

The state appealed to the Supreme Court. The state's jurisdictional statement presented the following two questions to the Court:

> I. Whether this Court's decision in Allen v. State Board Election, 393 U.S. 544 (1969) should be extended to cover a state's judiciary?

II. Whether past changes in North Carolina's judiciary must be precleared pursuant to § 5 of the Voting Rights Act, in light of the special circumstances of this case?

The Supreme Court summarily affirmed the three-judge court. 477 U.S. 901 (1986).

The State cites Fusari v. Steinberg, 419 U.S. 379, 388-89, n.15, 95 S.Ct. 533, 42 L.E.2d 521 (1975) for the proposition that a summary affirmance is of limited precedential significance. All Fusari teaches, however, is that lower courts may not construe a summary affirmance as having reached any issues other than those absolutely necessary to have resolved the case. As plaintiffs observe, summary affirmances "without doubt reject the specific challenge presented in the statement of jurisdiction" and "prevent lower courts from coming to opposite conclusions on the precise issues

presented and necessarily decided by those actions." Mandel v. Bradley, 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.E.2d 199 (1977).

For the Haith Court to have affirmed, it necessarily must have concluded that section 5 applies to the election of judges.[8]

Even in the absence of the Supreme Court's affirmance in Haith, the State has been unable to point to any language in the statute or in the legislative history in support of its contention that section 5 of the Voting Rights Act does not apply to the election of judges.

By its terms, section 5 of the Voting Rights Act does not differentiate among types of elections. Section 5 applies to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different

from that in force or effect on November 1, 1964." The Supreme Court has ruled that the broadest possible meaning should be given to the phrase "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." Allen v. State Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.E.2d 1 (1969). As the Allen Court noted, "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way." Id. at 566. See also Dougherty County, Georgia, Board of Education v. White, 439 U.S. 32, 99 S.Ct. 368, 58 L.E.2d 269 (1978); United States v. Sheffield Board of Commissioners, 435

U.S. 110, 122-23, 98 S.Ct. 965, 55, L.E.2d 148 (1978).

Although not dispositive on the issue of the intent of Congress in passing the 1964 Voting Rights Act, it is interesting to note that when Congress considered extending the Voting Rights Act in 1982, Congress apparently believed the Voting Rights Act applied to the election of judges. For example, Senator Hatch asserted that the Act's use of the term "'political subdivision' encompasses all governmental units, including city and county councils, school boards, judicial districts, utility districts, as well as state legislatures." S.Rep. 417 at 151, 1982 U.S. Code Cong. & Admin. News 323 (emphasis added). In addition, the statistical evidence presented to Congress in considering the need to extend the Voting Rights Act uniformly included

election of minorities to judgeships (where appropriate).

Thus, in light of the Supreme Court's summary affirmance of Haith, and in light of the broad language of section 5, we conclude that section 5 applies to the election of judges.

B.

Having concluded that the election of judges falls within the scope of section 5, our next task is to determine whether the specific changes at issue here trigger section 5 scrutiny, i.e., whether the statutes at issue here enact changes of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."

1. The creation of new circuits.

The defendants do not dispute that the creation of new judicial circuits falls under section 5; yet even while

acknowledging this, the State thus far has refused to take the necessary steps to preclear the redistricting changes. Indeed, the changing of geographical boundaries of election districts, either by redrawing or splitting pre-existing districts, however minor, is unquestionably a change that must be precleared under section 5. See 28 C.F.R. § 51.13(e) (Example of covered change includes "Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections)"). See also, e.g., McCain v. Lybrand, 465 U.S. 237, 104 S.Ct. 1037, 79 L.E.2d 271 (1984) (creation of residency districts within county falls under

section 5); Georgia v. United States, 411 U.S. 526, 93 S.Ct. 1702 (1973) (redistricting); Allen v. State Board of Education, 393 U.S. 544, 89 S.Ct. 817 (1969) (change from district to at-large voting); McMillan v. Escambia County, 559 F. Supp. 720 (N.D. Fla.) (redistricting), cert. denied, 464 U.S. 830, 104 S.Ct. 108, 78 L.E. 110 (1983).

The redistricting necessarily affects both the newly-created circuits and the prior circuits from which new circuits were created. Thus, the creation of the Houston Circuit from the former Macon Circuit, and the creation of the Alcovy Circuit from the Western and Stone Mountain Circuits implicates both the newly-created circuits and the current Macon, Western, and Stone Mountain circuits. Any judgeships that were added to any of these circuits after the

redistricting are, therefore, also subject to preclearance. Specifically, the following acts all require preclearance under section 5:

Year	Act	Change
1969	303 (as amended 1971, Act 587)	created Houston Circuit
1972	849	created Alcovy Circuit
1972	1194	Stone Mountain add'l judge
1976	996	Western add'l judge
1978	1082	Alcovy add'l judge
1981	772	Macon add'l judge
1984	851	Houston add'l judge
1986	1339	Stone Mountain add'l judge

2. The Creation of New Judgeships

In determining whether the addition of a new judgeship to an existing circuit is a covered change in a "standard, practice, or procedure with respect to voting," we recognize that "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way." Allen v. State Board of

Elections, 393 U.S. 544, 566, 89 S.Ct. 817, 832 (1969). See also Dougherty County, Georgia Board of Education v. White, 439 U.S. 32, 99 S.Ct. 368 (1978); United States v. Sheffield Board of Commissioners, 435 U.S. 110, 112-23, 98 S.Ct. 965, 974-75 (1978).

The regulations under section 5, promulgated by the Attorney General, stress the broad scope of "standard, practice, or procedure:[9]

> 28 C.F.R. § 51.12
> Scope of requirement.
>
> Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the section 5 preclearance requirement.

The Supreme Court has approved expressly of this expansive view of § 5: "Given the central role of the Attorney General in

formulating and implementing § 5, this interpretation of its scope is entitled to particular deference."[10] Dougherty County, Georgia Board of Education v. White, 439 U.S. at 39, 99 S.Ct. at 373. See also United States v. Board of Commissioners, 435 U.S. 110, 98 S.Ct. 965 (1978) (giving deference to Attorney General's contemporaneous interpretation as guide to congressional intent).

In addition to its express approval of the Attorney General's broad view of section 5, the Supreme Court has set the following standard for whether a proposed change falls within § 5: "In determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a potential for discrimination." Dougherty County, Georgia Board of Education v. White, 439

U.S. at 42, 99 S.Ct. at 374 (emphasis in original).

Thus, to determine whether the addition of a judgeship to a preexisting circuit is a covered change we must consider whether that addition has a potential for discrimination, and must conduct our inquiry in light of the Supreme Court's admonition that "Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way." We stress, however, that we may not consider the merits of whether or not a particular change has a discriminatory purpose or effect; rather, we may only consider whether it has a potential for discrimination.

The State argues that the addition of new judgeships does not constitute a covered change, and that it has no

potential for discrimination, as the new judges will be elected according to Georgia's majority-vote, designated-post, and circuit-wide voting election procedures, all of which have already been precleared.[11] According to the State, the creation of additional judicial posts does not change any "standard, practice, or procedure with respect to voting" where the method by which candidates will be elected to those posts has not been changed.

The State's argument, however, assumes that Georgia's election procedures were precleared with respect to the judgeships existing at the time of preclearance and with respect to any future judgeships. We cannot accept such an assumption. It is well established that the Attorney General does not preclear a change unless it is expressly

and unambiguously presented to him for preclearance. McCain v. Lybrand, 465 U.S. 253, 104 S.Ct. 1037 (1986). Preclearance occurs only in the context of an existing electoral scheme; the number of judges elected within a particular circuit constitutes part of that scheme. If adding new judicial posts, even where candidates will be elected according to precleared voting procedures, has "a potential for discrimination," then such an addition would be a covered "enactment" under section 5. Dougherty County, 439 U.S. at 42, 99 S.Ct. at 374.

Furthermore, the Attorney General could not have objected to the State's proposed election procedures based on the possibility that such procedures could have a discriminatory effect if additional judgeships were subsequently added. The Attorney General may only preclear that

which is presented to him, and preclearance of the election procedures as applied to election of a certain number of judges does not insulate those procedures from preclearance review when they are applied to a different number of judges and may, therefore, have a discriminatory effect.[12]

We think that, given Georgia's majority-vote, designated-post, and circuit-wide election rules, the creation of new judgeships does have the potential for discrimination. Where more than one judicial post exists in a given circuit, these election rules require a candidate to run for a specific seat. Georgia law thus precludes the alternative system where all candidates compete against each other and where judgeships are awarded to the highest vote-getters out of the field of candidates.

One effect of precluding the latter form of election is to prevent effective "single-shot" voting. In a "single-shot" voting campaign, a cohesive bloc of minority voters agrees to vote for only one candidate out of a group of candidates running for office, even though two or more officeholders will be elected out of the group of candidates running. For example, if two judges are to be elected out of a field of four candidates, the minority bloc of voters will vote for just one candidate. By focusing their voting power in this way, a minority group can sometimes elect someone to office without a significant amount of support from the majority group voters.[13] Majority-vote, designated-post, and circuit-wide election rules are often called "anti-single-shot" provisions because they render such "single-shot" campaigns futile.

Anti-single-shot provisions cut off one avenue by which minority voters can exercise the vote within the electoral system. Changes which mitigate the ability of minority groups to elect their choice of candidates are potentially discriminatory. Adding judges to a circuit can bring about just such a change, because the anti-single-shot provisions can affect adversely the voting rights of minorities depending upon the number of judicial posts available.

The potential for discrimination resulting from the interplay of anti-single-shot provisions and a change in the number of posts is most evident in the change from a single-judge to a multi-judge circuit. Twenty-four of the challenged acts implement such a change. Where only one judge is to be elected in a circuit, anti-single-shot provisions can

have no potential for discrimination. If another judicial post is added, however, such provisions may well be thwarting what would otherwise be an opportunity to conduct a successful single-shot voting campaign.[14]

Adding a post to a multi-judge circuit could have the same effect. Depending upon the percentage of minority voters and the cohesiveness of their voting, a successful single-shot voting campaign may be highly improbable until there are three or more available posts in the circuit.[15] If a single-shot campaign, although unavailing when only two posts are available, would be successful in a three-post race, then the addition of that third post alters the effect of the anti-single-shot provisions in that district. As stated above, because anti-single-shot provisions affect minority bloc voting

power, any potential change in the impact of such provisions creates the potential for discrimination. Thus, adding a judge or judges for either single-judge or multi-judge districts, has the potential for discrimination against the backdrop of anti-single-shot-election law provisions such as Georgia's.

Section 5 is a drastic remedy imposed on the States to remedy extraordinary wrongs. The State suggests that our ruling here will drastically expand the impact of Section 5. We disagree. The simple reality of Section 5 is that if a covered jurisdiction seeks to enact any change with respect to voting, however minor, that change must be precleared. If the Attorney General, or the District Court for the District of Columbia, refuses to preclear the change, then that change may not be enforced.

Contrary to the State's suggestion, our ruling here does not imply that if a State seeks to preclear any minor change, then the Attorney General may try to recast a state's entire electoral system. If a change is not precleared then the State retains the option of returning to the status quo ante. We recognize that this is harsh result, but it is mandated by federal law.[16]

IV.

It is undisputed that the defendants have not satisfied the requirements of Section 5. The defendants have not sought a declaratory judgment in the District of Columbia. Not only have they failed to preclear the changes with the Attorney General, but the Attorney General has notified the parties that he objects to the proposed changes in accordance with published regulations.[17]

The State has suggested that it is waiting to complete the section 2 case before it complies with the Attorney General's request for information. The defendants of course have that right, but that does not mean that the Attorney General must stop his consideration of the changes. As the Supreme Court has noted, the very purpose of section 5 is to require preclearance before changes can be put into effect, and to avoid using litigation by voters as the mechanism for testing changes in voting laws. See e.g., McCain v. Lybrand, 465 U.S. 236, 243-44, 104 S.Ct. 1037, 1042-43 (1984). If this court were to adopt the defendants' theory, and excuse their failure to comply with the Attorney General request for more information, it would undercut the core of section 5. The State's unilateral decision not to comply with the require-

ments of preclearance does not stay the operation of section 5.

We are mindful of the time that has elapsed since some of the changes were enacted. We cannot, however, "equitably preclear" any of the changes based on equity's rule of laches. See McCain, 465 U.S. at ---, 104 S.Ct. at 1046-47; cf. Haith v. Martin, 618 F. Supp. 410 (estoppel). Recognizing that the Attorney General could not keep track of changes relating to voting being made, Congress put the burden on the covered jurisdictions to seek preclearance to avoid the very problem we now face. We would do violence to the heart of section 5 if we were to excuse the State's failure to seek preclearance merely because the State has been disregarding section 5 for a long time. Moreover, Supreme Court precedent in this area is unambiguous. Allen v.

State Board of Elections, 393 U.S. 544, 571, 89 S.Ct. 817, 834; United States v. Sheffield Board of Commissioners, 435 U.S. at 136, 98 S.Ct. at 981; McCain v. Lybrand, 465 U.S. at 249-51, 104 S.Ct. at 1045-46. Section 5 means what it says: absent preclearance, a covered change may not be enforced.

V.

The final step for the three-judge court is to determine "what remedy is appropriate." Section 5 contemplates injunctive relief, which is by its nature equitable. Moreover, the Supreme Court has indicated that the three-judge court has some limited discretion in fashioning a remedy by directing that the court must fashion an "appropriate" remedy. See e.g., Perkins v. Matthews, 400 U.S. 379, 441, 91 S.Ct. 431, 441 (1971) (question of appropriate remedy for district court);

cf., N.A.A.C.P. v. Hampton County Election Comm'n, 470 U.S. 166, 183, 105 S.Ct. 1128, 1138, 84 L.E.2d 124 (1985) (discretion of district court). Thus, we must exercise our discretion in fashioning the appropriate remedy for the case at hand.

As we discussed above, a three-judge court cannot rule that the covered changes have been "equitably precleared." At the other extreme, we are not required to rule, as the plaintiffs suggest, that the covered changes are void ab initio, retroactively rendering void any actions taken by a judge whose position is the result of a covered change that was not precleared. Granting such a remedy would result in the reversal of years of convictions, the overturning of myriad judgments; in short, it would create genuine chaos. The plaintiffs were irresponsible to suggest that this court

follow such a course. We cannot stress too strongly that the validity of the actions taken by these judges is in no way implicated by our decision here.

The language of the statute -- "may not be enforced" -- suggests prospective relief. Moreover, in Berry v. Doles, 438 U.S. 192, 98 S.Ct. 2692, 57 L.Ed.2d 693 (1978), and N.A.A.C.P. v. Hampton County Election Commission, 470 U.S. 179, 105 S.Ct. 1128 (1985), the Supreme Court directed that appropriate relief under section 5 should include an order allowing 30 days for the state to submit the covered changes to the Attorney General for approval. N.A.A.C.P. v. Hampton County, 470 U.S. at 182, 105 S.Ct. at 1137; Berry, 438 U.S. at 192-93, 98 S.Ct. at 2693-94. Both these cases, however, involved situations where the covered changes had not been submitted to the

Attorney General at all, and thus the Attorney General had not objected. Here, on the other hand, except for the five 1989 judgeships (not counting Bartow County) that were not submitted by Georgia for preclearance, the Attorney General has objected to the changes. Nevertheless, the Attorney General has expressed that he is "ready and willing to reconsider" his determination, and we will take him at his word.[18] Thus, we believe it is appropriate for us to follow the course set out in Berry and N.A.A.C.P. v. Hampton County.

The defendants, therefore, have thirty days in which to comply fully with the Attorney General's prior request for information and to request reconsideration from the Attorney General of his objection to the proposed changes. See generally 28 C.F.R. § 51.45. The defendants, however, will not be allowed to use the preclear-

ance procedure in any dilatory manner at this late stage. Under the dictates of Berry and N.A.A.C.P. v. Hampton County, defendants have 30 days in which to complete their submission to the Attorney General, and they may of course request expedited consideration under 28 C.F.R. § 51.34. The defendants may not comply piecemeal and seek to stretch out the preclearance process.

In N.A.A.C.P. v. Hampton County the Court directed that

> [i]f appellees fail to seek this approval [from the Attorney General], or if the approval is not forthcoming, the results of the [] election should be set aside. If, however, the Attorney General determines that the changes had no discriminatory purpose or effect, the District Court should determine, in the exercise of its equitable discretion, whether the results of the election may stand.

470 U.S. at 182-83, 105 S.Ct. at 1137-38.

We turn now to the appropriate remedy on the one hand, if the defendants fail to seek reconsideration from the Attorney General or if the Attorney General objects to a covered change, or on the other hand, if the Attorney General concludes that a covered change does not have a discriminatory purpose or effect. We first will consider the latter alternative.

If, on reconsideration, the Attorney General concludes that a given change does not have a discriminatory purpose or effect, then we believe, in the exercise of our equitable discretion, that an election under that change should be allowed to stand. In so concluding, we note that until 1986, the date of the Supreme Court's summary affirmance of Haith v. Martin, it was not unequivocally clear that section 5 applied to the election of judges. See Perkins v. Matthews, 400 U.S.

394, 396, 91 S.Ct. 431, 441 (1971) ("in determining the appropriate remedy, other factors may be relevant, such as the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by § 5"). We also recognize the upheaval in the State judiciary that would result if we were to set aside the elections of a significant number of Superior Court judges. We are not unmindful of the fact that the State itself is responsible for the consequences of its failure to comply with the provisions of section 5, yet we believe that the potential harm to the people of the State of Georgia outweighs the potential harm (if any) of allowing the elections to stand. Thus, if the Attorney General finds that a change does not have a discriminatory purpose or effect, then the election under that

change (i.e., that particular additional judgeship) shall stand. Similarly, if the Attorney General concludes that the changes enacted in 1989 do not have a discriminatory purpose or effect, then the Governor may fill those positions.

We turn now to the more problematic issues. Should the defendants fail to seek reconsideration from the Attorney General within the 30 days permitted, or should the Attorney General decline to reconsider his prior objection, or should he, upon reconsideration, conclude that a particular change has a discriminatory purpose or effect, then we must afford some affirmative relief. N.A.A.C.P. v. Hampton County suggests, "the election should be set aside," N.A.A.C.P. v. Hampton County, 470 U.S. at 183, 105 S.Ct. at 1137-38, but this is not our only remedy. Cf. Perkins v. Matthews, 400 U.S.

at 395, 91 S.Ct. at 440 (declining to set aside election).

We have no difficulty holding that the Governor may not appoint judges to any non-precleared position created in 1989 until that position has been precleared. Further, we hold that in the case of a judgeship added to a preexisting circuit, no further election can be held for that position if the position is not precleared. However, we believe it a proper exercise of our equitable discretion to permit incumbents to serve out their full terms, and do not declare unprecleared judgeships added to circuits with unchanged boundaries void until the date of the next scheduled election for the position.

Allen v. State Board of Elections, 393 U.S. 569, 89 S.Ct. 817 (1968) is instructive. In Allen the Court refused

to set aside the elections at issue because, "[t]hese § 5 coverage questions involve complex issues of first impression -- issues subject to rational disagreement. The state enactments were not so clearly subject to section 5 that the [state's] failure to submit them for approval constituted deliberate defiance of the [Voting Rights] Act." 393 U.S. at 572, 89 S.Ct. at 835. As noted above, see supra Part II.A, the applicability of section 5 to the election of judges has, until recently, been a "subject of rational disagreement." Thus Allen suggests that it is within our discretion in fashioning the appropriate remedy to permit an incumbent to serve out a term of office.

If we were to set aside numerous judgeships abruptly, the remaining judges would be overwhelmed by the resulting

increase in work and the court system thrown into disarray. This would be harmful to all citizens of the State, including minorities. On the other hand, permitting these judges to serve out their term will not significantly injure the plaintiffs.

Thus, if the defendants fail to obtain approval of a change that adds a judgeship to a preexisting circuit we believe it best to allow the incumbent to serve out his term of office. If the Attorney General concludes that any of the judgeships created in 1989 has the purpose or effect of discrimination, then that post may not be filled, either by appointment or election.

We turn finally to the circuits that have been redistricted. If, upon resubmission and reconsideration, the Attorney General continues to object to the redis-

tricting, then we have no choice but to enforce the prior districting plan. As discussed earlier, all judgeships in these redistricted circuits are implicated by the State's failure to preclear the changes. Thus, again weighing the equities, we believe that the appropriate remedy in the event the defendants do not obtain preclearance is to direct that at the next regularly scheduled election the affected circuits shall revert to the prior districting plan and the previous number of judgeships, with the additional judgeships then terminating, even if, under the staggered term system, there remains time in the elected terms.

VI.

We are fully aware of the gravity of our decision here. We also are constrained to note that we have come to these conclusions reluctantly. Neverthe-

less, the State has pointed to no authority to suggest that section 5 does not apply to the election of judges, nor has the State been able to show that the addition of judges is not a covered change within the scope of section 5. By the same token, the State has failed to adduce any precedent that might justify its deliberate decision not to comply with the Attorney General's request for information, a decision that has forced us ineluctably to take the steps we have here.

Accordingly, following the explicit language of section 5 of the Voting Rights Act and Supreme Court precedent, we conclude that section 5 applies to the election of judges. We also conclude that the specific changes at issue here are covered changes that must trigger section 5 scrutiny. We further find that these

covered changes have not been precleared as section 5 requires. Therefore, as detailed above, because these changes have not been precleared, Congress has directed they "may not be enforced."

SO ORDERED.

APPENDIX A

Year	Act	Judicial Circuits
1967	93	Clayton
1967	99	Blue Ridge
1968	768 (amending 1967 Act 93)	Clayton
1967	175	Northeastern
1971	28	Tallapoosa
1972	852	Rome
1972	1091	Gwinnett
1972	1557	Cobb
1974	859	Conasauga
1977	237	Clayton
1977	291	Tallapoosa
1977	353	Gwinnett
1978	1007	Lookout Mountain
1978	1013	Cherokee
1978	1016	Cobb
1980	944	Tallapoosa
1980	944	Douglas
1980	1016	Rome
1981	119	Mountain
1981	122	Conasauga
1981	524	Douglas
1982	862	Cobb
1982	863	Gwinnett
1982	865	Rockdale
1983	364	Appalachian
1984	827	Cobb
1984	850	Clayton
1986	933	Northeastern
1986	934	Piedmont
1987	495	Gwinnett
1987	547	Cobb
1988	915	Appalachian

APPENDIX B

Changes to which the Attorney General has Objected

Year	Act	Judicial Circuits
1967	100	Stone Mountain
1967	101	Brunswick
1968	746	Ocmulgee
1969	183	Southern
1969	303 (amended 1971 Act 587)	Houston
1969	616	Chattahoochee
1971	457	Augusta
1971	802	Atlanta
1971	810	Atlantic
1972	849	Alcovy
1972	1194	Stone Mountain
1974	849	Coweta
1974	850	Atlanta
1974	857	Waycross
1974	858	Dougherty
1975	115	Southern
1975	503	Flint
1976	996	Western
1976	1108	Oconee
1977	244	Middle
1977	247	Northern
1977	293	Griffin
1977	336	Chattahoochee
1977	340	Alapaha
1978	1017	South Georgia
1978	1076	Ogeechee
1978	1082	Alcovy
1979	479	Ocmulgee
1979	515	Eastern
1980	725	Dublin
1980	978	Tifton
1980	1078	Brunswick

1980	1209	Cordele
1980	1350	Coweta
1981	101	Southwestern
1981	107	Waycross
1981	123	Toombs
1981	124	Pataula
1981	772	Macon
1982	860	Atlantic
1984	845	Atlanta
1984	851	Houston
1986	1336	Augusta
1986	1339	Stone Mountain
1987	315	Griffin
1987	743	Brunswick
1988	911	Stone Mountain

APPENDIX C

Non-Precleared Judgeships Created in 1989

Act	Circuit
S.B. 142	Southern Judicial Circuit
H.B. 559	Chattahoochee Judicial Circuit
H.B. 306	Eastern Judicial Circuit
S.B. 167	Atlantic Judicial Circuit
H.B. 721	Atlanta Judicial Circuit

Endnotes of Memorandum and Order of December 1, 1989

1. These plaintiffs include: Representatives from Fulton County to the Georgia General Assembly; residents and voters of Fulton County; residents and voters of Glynn County, Georgia; a resident and voter of Muscogee County, Georgia; a resident and voter of Mitchell County, Georgia; a resident, voter, and Representative to the Georgia General Assembly of Dougherty County, Georgia; a resident and voter of Bibb County, Georgia; a resident, voter, and elected official of Chatham County, Georgia; and a resident and voter of Wilkes County, Georgia. All plaintiffs are black.

2. Oral argument, Tr. at 5.

3. Other named defendants, having been found unnecessary to provide full relief, were dismissed pursuant to Fed. R. Civ. P. 21.

4. Section 1973c provides in relevant part:

> § 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three judge district court; appeal to Supreme Court
>
> Whenever a [covered] State or political subdivision [...] shall

(Endnote 4 cont.)

> enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, [...] such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an

(Endnote 4 cont.)

> expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

5. The information requested by the Justice Department included: the legislative history of the statutes, alternatives considered, and newspaper accounts of the superior court system; criteria used in deciding when to create

(Endnote 5 cont.)

new circuits rather than adding judgeships to existing circuits; description of participation by the black community in the decision-making process; state reports or studies, from 1964 to date, relating to judicial reform, elections, additions, or redistricting; election returns since 1964 identified by race and incumbency, and also data relating to quantity and racial designation of registered voters.

6. Implicit in this is, of course, the recognition that some changes are not covered changes. For example, if a state merely codifies its election laws, this is a change, but it is not a covered change because it does not alter a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." E.g., Kirksey v. Allain, 635 F. Supp. 347, 350 (S.D. Miss. 1986) (three-judge court).

7. We also note that § 2 of the Voting Rights Act has been held to apply to the election of judges. Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988); Chisom v. Edwards, 839 F.2d 1056 (5th Cir.), cert. denied, 109 S.Ct. 390 (1988); Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988).

8. The Haith court said that "Defendants have not challenged plaintiff's contentions that each of the statutes in question deals with a 'standard, practice, or procedure with respect to voting,'" 618 F. Supp. at 410.

(Endnote 8 cont.)

This does not mean that the defendants conceded that § 5 applies to the election of judges. Indeed, to the contrary, one of the issues on appeal to the Supreme Court was squarely presented as whether § 5 applies to the election of judges. What the Haith court's observation means is that the defendants did not challenge whether the changes were specifically "covered changes."

9. See also 28 C.F.R. § 51.13 (Examples of changes.)

> Changes affecting voting include, but are not limited to, the following examples:
>
> (a) Any change in qualifications or eligibility for voting.
>
> (b) Any change concerning registration, balloting and the counting of votes and any change concerning publicity for or assistance in registration or voting.
>
> (c) Any change with respect to the use of a language other than English in any aspect of the electoral process.
>
> (d) Any change in the boundaries of voting precincts or in the location of polling places.
>
> (e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or

(Endnote 9 cont.)

changing to district elections from at-large elections).

(f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

(g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

(h) Any change in the eligibility and qualification procedures for independent candidates.

(i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices).

(j) Any change affecting the necessity of or methods for offering issues or propositions for approval by referendum.

(k) Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of Section 5.

10. The Attorney General has filed an amicus brief in this case on behalf of plaintiffs, in which he expresses his belief that the addition of judgeships to preexisting circuits is a "covered change" under section 5.

11. The State is correct in its assertion that the designated-post, majority-vote, and circuit-wide election procedures were precleared in the context of the then-existing electoral scheme. In United States v. Georgia, C.A. No. C76-1531A (N.D. Ga. 1977)(three judge court), aff'd mem., 436 U.S. 941 (1978), the court concluded that the majority-vote and designated-seat election requirements had been precleared. In 1968 the Attorney General precleared the change (involving an amendment to the state constitution), whereby Georgia went from state-wide to circuit-wide election of judges. Finally, in 1983, the Attorney General precleared the change from partisan to non-partisan election of judges.

12. In McCain v. Lybrand, 465 U.S. 253, 104 S.Ct. 1037 (1986), South Carolina had enacted a change in the county governance of Edgefield County. Under the 1966 act, "a three-member county Council with broad legislative and administrative powers was created, and the county was divided into three residency districts for purposes of electing Council members." 465 U.S. at 239-40, 104 S.Ct. at 1040-41. This change was never submitted to the Attorney General for preclearance. In 1971 the state changed the number of councilmen from three to five, which necessitated the redistricting of the

(Endnote 12 cont.)

County into five residency districts. This change was submitted to the Attorney General for preclearance, and the Attorney General did not object to the change. Subsequently, an action was brought under section 5 alleging that the 1966 change had never been submitted to the Attorney General for preclearance.

The Supreme Court reversed the three-judge court, and held that the preclearance of the 1971 change from three councilmen to five and the attendant redistricting did not have the effect of preclearing the 1966 change that instituted the County Council. McCain v. Lybrand, 465 U.S. at 249-50, 104 S.Ct. at 1045-46.

Thus, under the rule of McCain, the Attorney General could not have precleared the addition of a judgeship to a circuit--if that is itself a covered change--when he precleared the majority-vote and designated-post requirements.

13. Assume a district with 40 minority-group voters and 60 majority-group voters where there is a racial bloc voting and two seats available. If anti-single-shot provisions are in place, so that head-to-head campaigns are required, the minority group will never elect a candidate on its own without obtaining at least some majority-group votes.

(Endnote 13 cont.)

However, where there are two seats available, the absence of anti-single-shot provisions may enable the minority group to elect a candidate. For example, under a scheme where voters may vote for any two from a field of four candidates, where minority voters can engage in single-shot voting, and where the highest two vote-getters win, the election results in our hypothetical district could be as follows:

minority candidate	40 votes
non-minority candidate #1	50 votes
non-minority candidate #2	35 votes
non-minority candidate #3	35 votes

In this situation, one minority candidate and one non-minority candidate would win, the minority voters all having voted for the minority candidate and having refused to cast any votes for majority candidates.

Although the non-minority vote need not necessarily so split, nonetheless, under anti-single-shot provisions such a result would never obtain under polarized voting.

14. See supra note 12.

15. For example, in a district with a 30 percent minority voting bloc, where there are only two posts, even in the absence of anti-single-shot provisions and even if the majority splits its vote with 35 percent going to each position, the majority will defeat any minority choice which, assuming racial bloc voting, would have 30 percent of the vote at most. When a third post is added, however, the anti-single-shot provision does make a difference because in its absence minority voters could elect a candidate by concentrating all its vote on one candidate.

16. The cannonade of the dissent is more deafening than persuasive, as the straw opinion it attacks simply is not the majority opinion. The majority had to determine whether the enactments in question have a potential for discrimination. We do not--indeed we cannot--decide whether these enactments are in fact discriminatory. If minority voters vote as a bloc, then the addition of judges can have a discriminatory effect. The dissent does not refute that assertion. Instead, it refuses to "assume that blacks or whites will always vote in racially polarized bloc patterns." So do we. We merely note that they may vote in such a pattern, and if so, then the addition of judges may have a discriminatory effect. We do not conclude that such a voting pattern will occur, and we certainly do not hope for such a result. We may not, however, assume that such polarized voting will not occur.

(Endnote 16 cont.)

It may be that the Attorney General, in reviewing the evidence of prior voting patterns (evidence the Attorney General requested and that Georgia refused to provide), will determine that the potential discriminatory effect of these changes will not be realized. That determination is for the Attorney General, not this court.

Ironically the dissent takes us to task for "supplanting the will and wisdom of the elected Legislative of Georgia . . ." when it would have us disobey the "will and wisdom" of the "elected legislature" of the United States embodied in the Voting Rights Act. That we cannot do. We share the concern expressed by the dissent over the potentially troubling effects of our decision upon the state judiciary. However, after careful study of the Voting Rights Act, its legislative history, and its construction by the courts, we have concluded that the result herein is mandated by the will of Congress.

The dissent emphasizes the changing attitudes of American voters reflected in the growing number of minority elected officials. Given these changes, Judge Bowen asserts that the addition of judges actually will have no discriminatory effect and that the potential for discrimination is "imaginary." His conclusion is based on his belief in how voters will cast their ballots. We, however, must heed the

(Endnote 16 cont.)

Supreme Court's admonition in Dougherty County, Georgia Board of Education v. White: "in determine if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a potential for discrimination." 439 U.S. at 42, 99 S.Ct. at 374 (emphasis in original). The addition of judges can have such a potential, and we are not free to "imagine" otherwise.

17. C.F.R. § 51.40 Failure to complete submissions.

> If after 60 days the submitting authority has not provided further information in response to a request made pursuant to § 51.37(a), the Attorney General, absent extenuating circumstances and consistent with the burden of proof under Section 5 described in § 51.52(a) and (c), may object to the change, giving notice as specified in § 51.44.

18. See also 28 C.F.R. § 51.45 (procedure governing requests for reconsideration).

BOWEN, District Judge, concurring in part, dissenting in part:

With portions of the majority opinion in this case, I concur; as to its treatment of the most straightforward issue, I dissent.

The majority opinion has all of the indicia of apparent validity: a balanced statement of the facts; a wealth of citations and case references; and a scholarly style. Nevertheless, it is incorrect on the most important point in the case. I have no quarrel with the majority opinion through and including section III(B)(1) thereof. Like it or not, where there are changes in the geography of a judicial circuit within a "covered jurisdiction," the Attorney General's preclearance is required. Indeed, the need for preclearance of the legislative enactments which change the geography of a judicial circuit

has never been seriously questioned in this case. Under present law, every change in the demography of a judicial circuit requires preclearance.

Nor do I have any question in my mind that Haith, in its summary affirmance posture, stands for the proposition that the Voting Rights Act applies to judicial electoral procedures. However, in the laborious research which the parties and this Court have performed, there is no binding precedent that the mere increase in the number of judges in an existing, otherwise validly composed judicial circuit, is a change in a "standard, practice, or procedure with respect to voting."

The majority believes that a duplication or other multiplication of the status quo, by the mere addition of a judgeship, is a covered change because of a perceived

"potential for discrimination" therein. The proffered potential for discrimination is imaginary. This potential for discrimination (a) presumes the existence of factors which are not grounded in fact; and (b) presupposes that some novel and ingenious method might be crafted to accommodate the wishes of plaintiffs and their class whenever a new judgeship is needed. While it is true that only a potential for discrimination, not a discriminatory purpose or effect, must be shown, the acceptance of the genuineness of the potential for discrimination proffered by the plaintiffs in this case requires a degree of credulity which I cannot muster, even under the liberal construction principles of the Voting Rights Act.

The majority sees a potential for discrimination in the addition of a

judgeship to an existing district because the added judge must be appointed by the governor, must later run for designated post, and must be elected by a majority vote in a circuit-wide election. In other words, there is a "potential for discrimination" because the new judge will obtain and hold office in the same way as every Superior Court judge in Georgia! Also, the majority sees a potential for discrimination because, when additional judges are needed to handle the judicial business of a district, the Legislature has not crafted the boundaries of districts so as to produce a select constituency which will elect a judge through the racially polarized bloc vote of the plaintiff class. This proposition is based upon erroneous assumptions and logical fallacies.

I live in a Georgia city which elected a black mayor by majority vote in a 1981 city-wide election. Our county commission has thrice been chaired by a black man. A black Superior Court judge runs unopposed for re-election. The man who will soon occupy the governor's office in the former capital of the Confederacy is part Negro. Yet, I am supposed to assume that whites and blacks always vote in racially polarized bloc patterns. Common sense tells me I cannot. If Georgia is ever to emerge from the indignity of federal scrutiny of electoral minutiae, it will occur by assuming the positive, not the negative. Similarly, I observe that in my experience nothing has done more to perpetuate racial polarization and promote misunderstanding between well-intended citizens than the frictions inherent in the continued selective appli-

cation of the Voting Rights Act. Furthermore, I can imagine no set of facts more likely to foster racial bloc voting than the "single-shot" voting tactic to which the majority refers in Section III of their opinion (see footnote 12).

Judicial service is unique in government. Judges are human, but we are obliged to adhere to certain fictions relative to judicial service. For example, judges are fair, impartial, and serve only to do equal justice in the cases that come before them, regardless of the race, position, station in life, affiliation or connection of the parties therein. These properties in the compound of judicial service are recognized by the highest legal authority. "State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because

of their frequent differences of opinions as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office." Sumner v. Mata, 449 U.S. 539, 549 (1981).

Any suggestion that the Legislature of Georgia might seriously entertain the notion of gerrymandering within one or more of its judicial circuits a precinct, wherein a person preferred by the plaintiff class might assuredly be elected, is anathematic and inimical to all Anglo-American tenets of judicial independence and impartiality. Every Negro and every Caucasian is entitled to the same fair justice from a Superior Court judge, regardless of the race of the judge or the race of the majority who may have elected that judge. Obviously, a judge cannot have a constituency in the usual sense.

A judge does not sit upon a board or commission and represents no group or district. A Superior Court judge presides alone, with county-wide jurisdiction, in the courts of the counties of his judicial circuit. In appropriate circumstances, a Superior Court judge may be detailed to serve outside the home circuit.

The county is the smallest unit or precinct which can be practically utilized in the election of Superior Court judges. Given the county-wide jurisdiction of a Superior Court judge, it would be wholly inappropriate for such a judge to be elected by any group smaller than the constituency of the county as a whole. The suggestion that the Legislature might develop some plan to provide a "safe district" to assure the election of a candidate chosen by the plaintiff class is rank speculation. There are 159 counties

and 45 judicial circuits in Georgia. This case alone involves 43 added judgeships. The options open to the Legislature are limited. Confusion is the only likely result of an attempt to "gerrymander" the counties so as to assure the election of the judicial candidate of a racial group.

The majority is willing to adopt the plaintiffs' vernacular, "anti single-shot provisions." I am not. While majority-vote, designated-post, circuit-wide election rules may be called "anti-single-shot" provisions by some, I am prepared only to refer to such rules as a uniform, state-wide, fair and consistently applied system for the selection and maintenance of a highly qualified, dedicated judiciary. The "single-shot" voting technique described by the majority, as applied to the election of a Superior Court judge, makes my hair stand on end. Such "single-

shot" tactics are unlikely to result in a judicial selection which is based upon qualifications and judicial temperament. A voting plan which is otherwise valid, but does not permit such "single-shot" tactics in the election of judges, is not thereby necessarily infected with a potential for discrimination. In this case, in each of the judicial circuits to which judgeships have been added, the legislature has done no more than increase the number of judges by a method which, admirably, conforms every Superior Court judgeship in the state to the same process. Thus, there are independent and very legitimate reasons for the continuation of the existing election procedures when a new judgeship is added to a judicial circuit.

The majority identifies the mere addition of a judgeship in an existing

district as a potential for discrimination because "if another judicial post is added . . ., such provisions may well be thwarting what would otherwise be an opportunity to conduct a successful single-shot voting campaign." This logic assumes that with the creation of each additional judgeship, the Legislature can concoct some discrete voting procedure, applicable to that judicial circuit alone, which, by boundary alignment," single-shot" voting practices or otherwise, will advance the interests of the plaintiff class. The implicit assumption that the legislature might be willing to discard a working uniform, state-wide procedure for the selection of all Superior Court judges, and steer a new course leading to different procedures for each circuit, is preposterous. Because Superior Court judges have county-wide jurisdiction

within their circuits, because they may, on occasion, be designated from one circuit to another, and because their courts are vested with general civil and criminal jurisdiction in each of the counties of the State of Georgia, the state has a palpable, genuine, independent, legitimate interest in maintaining a uniform method of selecting Superior Court judges of high caliber. This interest far outweighs any concern which the majority should have for a volubly touted "potential for discrimination" which, at best, is hypothetical and ephemeral.

In short, the majority has decided that the Legislature of Georgia has not done what it could never be expected to do in the first place. Even in a voting rights case a potential for discrimination should be more than a chimera. To provide a basis for such drastic relief, a poten-

tial for discrimination should, at the least, be genuine and reasonable. I cannot conclude that some affirmative action-based "balkanization" of judicial voting procedures across the state is a likely or appropriate prospect. The proffered potential for discrimination, therefore, is neither genuine nor reasonable.

Finally, it is unfair to describe the existing plan for electing most of the Superior Court judges of this state as containing "anti single-shot provisions." The laws which provide for the selection of Georgia's judges, many of which have been precleared, are not "anti-anything." They are simply an extension of existing provisions which draw the highly desirable mantle of uniformity over each such position existing within the State of Georgia.

While I will not engage in what might be termed "result oriented" logic, I will express my concern for the far-reaching effect of the majority's conclusion in this case. The decision regarding changes in circuit boundaries affects relatively few counties and judges. Relief in the form of a return to the last valid plan is workable, albeit burdensome. However, the decision as to 43 added judgeships is a wholesale and unwarranted intrusion into Georgia's judicial system and the fundamentals of federalism.

In the palliative language of Section V of their opinion, the majority recognizes the chaos which would certainly result if the elections of sitting judges were invalidated. The apologia of Section VI, the relatively mild form of relief ordered, and the majority's assurances to the contrary notwithstanding, this court's

decision as to judgeships added over the years will, if implemented, work much mischief, hardship, and expense within the State of Georgia for years to come. Despite the majority's anticipatory comment, "the validity of the actions taken by these judges is in no way implicated by our decision here," many unhappy litigants in civil and criminal cases may raise that question anew. My imagination is not broad enough to estimate the number and the cost of the resultant habeas corpus proceedings alone. Even if unsuccessful, such cases will be filed and the state will be forced to defend them.

In this action the role of the three-judge court is indeed limited. With respect to the creation of new judgeships in existing circuits, our sole inquiry is whether the proposed change falls within

Section 5. My view is that a mere change in the number of judges is not a change with respect to the election of judges. There is at issue here no standard, practice, or procedure with respect to voting different from that already precleared or in force as of November 1, 1964. There is no argument that the existing judicial circuits in which judgeships have been added are somehow otherwise infirm (see footnote 11). The mere replication of a judicial position in a circuit does not result in a covered change. If anything, the addition of a judgeship is a legislative reiteration of the status quo.

Congress intended the Voting Rights Act to cover judicial elections (see majority opinion Section III(A)). However, this conclusion does not end the inquiry into congressional intent. The plaintiffs' arguments, which the majority

hasten to embrace, imply that Section 5 preclearance is an undertaking easily satisfied. However, as the defendants have demonstrated, preclearance is a laborious process which requires the submission of a tremendous amount of documentation. Preclearance is not accomplished by writing a simple letter. The onus on the state in compiling and organizing the information necessary to comply with the preclearance requirement is great. I cannot believe that the Congress intended to place upon "covered" states the burden of preclearing each new judgeship added to existing judicial circuits, where election procedures have already been precleared. The majority have cited no authority that such was Congress' intention in passing Section 5 of the Voting Rights Act. The case law cited by the majority merely holds that

the Voting Rights Act should be liberally construed. However, this is not authority for the plaintiffs' proposition that adding judgeships to existing judicial circuits using precleared election procedures is a change in a "standard, practice, or procedure with respect to voting."

The potentials for discrimination to which the majority anchor their reasoning is imaginary. The state's overriding independent, legitimate interest in maintaining a uniform election procedure is clearly shown. Accordingly, with respect to the issue of the addition of judgeships in existing circuits, the plaintiffs' complaint should be dismissed.

As do the majority, I have great concern about any relief to be ordered in this case. The one thing of which I am certain is that whatever the relief, it

will serve to undermine the confidence of the public in the federal and state court systems and the judiciary as a whole. I agree with Judge Dubina when he said, "there is a real possibility that no fair, reasonable, and equitable remedy can ever be fashioned to redress whatever . . . violations may exist in the instant case. Any remedy may only serve to further polarize the voting blocs which currently exist, and will almost certainly result in the removal from the bench of a number of decent, fair and competent state judges with many years of dedicated service. In remedying one injustice this court may, in effect, be creating others." Southern Christian Leadership Conf. v. Siegelman, 714 F. Supp. 511, 521 (M.D. Ala. 1989). We embark upon a dangerous voyage. We are about to supplant the will and wisdom of the elected Legislature of Georgia with

decrees that are the product of the well-intended but inexperienced judicial mind. The Legislature has been creating judgeships for two hundred years. We have only just begun. As Justice Stevens cogently noted, "Because judges may not possess such expertise, however, I am afraid the Court is planting seeds that may produce an unexpected harvest." Rogers v. Lodge, 458 U.S. 613, 645 (1982) (Stevens, J., dissenting).

While I reject the proffered potential for discrimination which the majority adopts, while I cannot accept as a premise to any decision the concept that blacks or whites will always vote in racially polarized bloc patterns, and while I disagree with the majority opinion that the mere addition of judgeships constitutes a covered change requiring preclearance by the Attorney General, I am also con-

strained to say that the relief ordered by the majority is about as ameliorative as could be hoped under the circumstances.

Accordingly, with respect to the covered changes as to which I concur with the majority, I concur in the relief ordered. With respect to the judicial circuits where the number of judgeships has only been increased, I would deny any relief to plaintiffs.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

C. A. 288-146

[Filed March 26, 1990]

TYRONE BROOKS, et al.,	:
	:
Plaintiffs,	:
	:
vs.	:
	:
STATE BOARD OF ELECTIONS, et al.,	:
	:
Defendants.	:
	:

Before KRAVITCH, Circuit Judge, EDENFIELD and BOWEN, District Judges.

O R D E R

Defendant's Motion for Reconsideration of the Remedy is DENIED, without prejudice to renew the motion when the Department of Justice has completed the Section Five review or after April 23, 1990, whichever first occurs. The concerns of the defendant raised in its motion are premature as we do not yet know whether the Department of Justice will or

will not preclear the challenged judgeships.[1] Moreover, we note that the December 1, 1989 order of this Court does not preclude individuals from qualifying for Superior Court judgeships in anticipation of Justice Department preclearance of the added judgeships. Cf. Libertarian Party of Georgia v. Harris, 644 F. Supp. 602, 604-5 (N.D. Ga. 1986) (qualifying requirements may be satisfied during pendency of preclearance process).

SO ORDERED.

---

1. According to the state, twenty-one judgeships, objected to by the Justice Department, are scheduled for elections in 1990. In addition, five newly created judgeships have been submitted to the Justice Department for preclearance.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

C. A. 288-146

[Filed May 29, 1990]

TYRONE BROOKS, et al.,	:
	:
Plaintiffs,	:
	:
vs.	:
	:
STATE BOARD OF ELECTIONS, et al.,	:
	:
Defendants.	:
	:

Before KRAVITCH, Circuit Judge, EDENFIELD, Chief District Judge, and BOWEN, District Judge.

O R D E R

On April 25, 1990, the Attorney General completed his Section 5 review of the statutes being challenged in this case and declined to withdraw his objections to those statutes creating additional judgeships. The next day, defendants renewed their motion for reconsideration of the remedial portion of this Court's December 1, 1989 Order, which calls for the

elimination of unprecleared judgeships at the end of the sitting incumbent's terms. Having carefully weighed the arguments of each side, we GRANT the motion.

Defendants ask that we allow judges in unprecleared seats to remain in their posts, beyond the end of their terms if necessary, until a new electoral scheme is precleared and implemented. They contend that such a modification will guarantee time to seek preclearance from the District Court for the District of Columbia without risking the loss of sitting judges during the pendency of that litigation.

We understand the State's desire to pursue judicial preclearance, in which the parties obtain a full trial on the merits. In the case at bar, issues of statewide importance lie in the balance. While Congress provided for preclearance review

by the Justice Department as an administrative alternative to the declaratory judgment action, see Morris v. Gressette, 432 U.S. 491, 503 (1976), it may be that the issues in this case warrant an adversarial proceeding.

By granting the requested relief, we assure that the defendants will be able to seek judicial review of the statutes without the risk of serious disruption of Georgia's judiciary.[1] The modification

---

1. As plaintiffs accurately note, defendants could have filed a declaratory judgment action at any time after the statutes creating the new judgeships were passed; the oldest of the statutes was passed in 1967. However, before the issuance of our December 1, 1989 Order, the question of whether the new judgeships were covered by Section 5 was in dispute. We assume that defendants will now expeditiously pursue judicial preclearance.

does not impose an undue burden upon the plaintiffs or upon the minority voters who the plaintiffs propose to represent. Therefore, we change the second full sentence on page 26 of our Order of December 1, 1989 to read as follows:

> Incumbents whose terms end in 1990 may continue to serve in unprecleared judgeships until one of the following events occurs:
>
> a) our December 1, 1989 Order requiring preclearance is reversed by the United States Supreme Court;
>
> b) a declaratory judgment favorable to the defendants is obtained from a court of competent jurisdiction, as provided for in the Voting Rights Act;
>
> c) the state legislature of Georgia enacts a scheme for judicial elections which is precleared, and an election is conducted pursuant to that scheme.
>
> Should the event described in either subsection (a) or (b) occur, these judges may hold over until the state conducts new elections. Further, should the plaintiffs prevail in the declaratory judgment action, the incumbents whose terms end in 1990 may continue to serve in the unprecleared judgeships for 150 days. In the event of any vacancy in an unprecleared judgeship by reason of death,

resignation, or otherwise, the Governor may make appointments as authorized by the laws of Georgia.

The remainder of our Order is unchanged. The most recently created judgeships, to which no judge has ever been elected, will continue to go unfilled until precleared. Any decisions by incumbent judges holding over pursuant to this Order are of course valid. The Court's adjudication of this matter is now final.

SO ORDERED.

BOWEN, District Judge, Concurring Specially.

I concur in this Court's order to grant defendants' motion for rehearing, reconsideration, etc., originally filed December 15, 1989, and subsequently renewed. My concurrence with the order granting some of the relief sought in said motion is not indicative of any retreat from the position expressed in my dissent to the December 1, 1989 majority opinion. I concur in the grant of defendants' motion for rehearing and reconsideration because it allows most of the judicial machinery of the State of Georgia to remain in operational status quo while the merits of these controversies are litigated in this Court, on appeal, and, perhaps, in the District of Columbia.

I continue in my firm belief that where the only change in an existing

judicial circuit is to increase the number of judges, such is not a "covered change" within the purview of section 5 of the Voting Rights Act.

In the December 1, 1990 opinion and order, a majority of this Court found a potential for discrimination because of the possibility of perpetuating "anti-single-shot" voting practices through circuit-wide elections of judges to numbered posts by majority vote. Also, it seems that the majority was unwilling to balance fundamental interests of the State of Georgia against a mere potential for some dilution of minority interests remediable only by drastic, intrusive redistricting. To me, the concept of a judge with a special interest constituency is no less anathematic today than it was last December.

The principles I embrace are not heard only in the "cannonade" of my earlier dissent. Such concepts are emerging from diverse courts. In State of Mississippi v. USA, No. 87-3469 (D.D.C. August 2, 1988), Sentelle, Charles R. Richey, and Oberdorfer, J.J., granting a motion for summary judgment, observed, ". . . there was no opportunity for single-shot voting prior to 1964, and there is no opportunity for single-shot voting today. Thus, undisputed facts establish that the legislation increasing the number of numbered judges in multi-judge districts does not affect any retrogression in minority voting strength, and hence has no discriminatory effect." (emphasis added). Moreover, the Fifth Circuit Court of Appeals in League of United Latin American Citizens v. Clements, Nos. 89-8095, 90-8014 (5th Cir.

May 11, 1990) noted ". . . that judges do not represent a specific constituency." Observing that "district courts in Texas consist of individual judges who decide their cases alone," that "there can be no share of the authority vested in each judge," and that "the full authority of that office is exercised exclusively by one individual" the court ruled, "consequently, the county-wide election of district court judges does not violate the Voting Rights Act." Ibid.

I hasten to add that the aforementioned two cases, while analogous, are neither controlling nor persuasive precedent here. Because they arose under different applications of the Voting Rights Act, the standard under which those cases were decided was that of "discriminatory effect," not the "potential for discrimination" found in this case. How-

ever, since section 2 of the Voting Rights Act is arguably more intrusive than is section 5, it is not illogical to conclude that a practice which does not have the effect of discrimination is also without a potential for discrimination.

Thus, while I would prefer for this Court to reopen the entire matter and reverse its decision regarding the statutes which increase the number of judgeships in previously existing judicial circuits, I must nevertheless concur in a result which permits the operational status quo of Georgia's judicial system for the duration of litigation.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

C. A. 288-146

[Filed June 25, 1990]

TYRONE BROOKS, et al.,

Plaintiffs,

vs.

STATE BOARD OF ELECTIONS, et al.,

Defendants.

Before KRAVITCH, Circuit Judge, EDENFIELD, Chief District Judge, and BOWEN, District Judge.

O R D E R

Pursuant to Fed. R. Civ. P. 60(a), the court, of its own initiative, corrects its Order of May 29, 1990, to add language that was inadvertently omitted.

Fed. R. Civ. P. 60(a) provides:

> **(a) Clerical Mistakes.** Clerical mistakes in judgments, order or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any

> party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

In accordance with the above rule, the court orders that the clause, "Provided that the State files a declaratory judgment action within 90 days," precede the language on page 2 of the Order of May 29 that reads, "Incumbents whose terms end in 1990 may continue to serve in unprecleared judgeships until one of the following events occurs: . . . ." Thus, the Order will read: "Provided that the State files a declaratory judgment action within 90 days, incumbents whose terms end in 1990 may continue to serve in unprecleared judgeships until one of the following events occurs: . . . ."

Because the above language was omitted from the May 29 Order, the 90 days shall run from the date this Order is filed.

* *

BOWEN, District Judge, dissenting. It is my view that the business of this court is to resolve disputes and to accord appropriate relief in the cases which arise before us. It is not our proper function to condition an order upon the filing of another lawsuit in another court.

The filing of a lawsuit or an appeal is a matter of strategy best left to the unfettered judgment of the parties. Such a decision should not be mandated by the court through the imposition of conditions; especially one which, at best, leaves a party little choice.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

C. A. 288-146

[Filed June 14, 1990]

TYRONE BROOKS, et al.,	:
	:
Plaintiffs,	:
	:
vs.	:
	:
STATE BOARD OF ELECTIONS, et al.,	:
	:
Defendants.	:
	:

NOTICE OF APPEAL

Notice is hereby given that all Plaintiffs herein appeal to the Supreme Court of the United States from the orders of December 1, 1989 and May 29, 1990 entered by this three-judge court. This appeal is taken pursuant to 28 U.S.C. §1253 and 42 U.S.C. §1973b(a).

This 13th day of June, 1990.

KATHLEEN L. WILDE
LAUGHLIN McDONALD
NEIL BRADLEY
American Civil Liberties Union
Foundation, Inc.
44 Forsyth Street NW, Suite 202
Atlanta, Georgia 30303
404/523-2721

COUNSEL FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

C. A. 288-146

[Filed June 22, 1990]

TYRONE BROOKS, et al.,	:
	:
Plaintiffs,	:
	:
vs.	:
	:
STATE BOARD OF ELECTIONS, et al.,	:
	:
Defendants.	:
	:

Before KRAVITCH, Circuit Judge, EDENFIELD and BOWEN, District Judges.

O R D E R

Before the Court is the plaintiffs' motion requesting that the Court stay certain effects of its Orders dated December 1, 1989 and May 29, 1990 and enjoin the defendants from "continued violations" of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1982). The Court DENIES the plaintiffs' motion.

SO ORDERED.

U. S. Department of Justice
Civil Rights Division
Office of the Assistant
Attorney General
Washington, D. C. 20536
April 25, 1990

Honorable Michael J. Bowers
Attorney General
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Dear Mr. Attorney General:

This refers to the following matters which are before the United States Attorney General for review under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, with respect to the State of Georgia:

1. the January 2, 1990 request for reconsideration of the June 16, 1989 objection to the establishment of 48 additional superior court judgeships, the specification of the date on which the first full term of office commenced for each new judgeship, and the creation of

two additional superior court circuits and the district attorney positions to serve those circuits;

2. the January 2, 1990 submission of five additional superior court judgeships created in 1989, and the specification of the date on which the first full term of office commences for each judgeship; and

3. the April 3, 1990 submission of the five additional superior court judgeships created in 1990, and the specification of the date on which the first full term of office commences for each judgeship.

On March 2, 1990, we received the information necessary to complete our review of the reconsideration request and to complete the January 2, 1990 submission.

The changes now before the Attorney General for Section 5 review date back to 1967 and involve a far-reaching expansion

of the superior court system undertaken over a period of twenty-three years. This includes over one-third of the system's 148 elective judgeships, and involves 30 of the 45 superior court circuits in the state. Thus, while we have been fully cognizant of the state's request for expedited review, the comprehensive nature of these submissions, as well as the importance of the changes to the state and its minority citizens, has required a considerable amount of time for us to give the kind of careful consideration due a submission of such proportions.

At the outset, we note that the expansion of the superior court system occasioned by the establishment of the additional judicial positions must be analyzed in the context of the method utilized to elect the judges. City of Lockhart v. United States, 460 U.S. 125,

131-132 (1983). See also McCain v. Lybrand, 465 U.S. 236, 255 n.27 (1984). In Georgia, superior court judges are elected at large within each circuit. A majority vote requirement exists in both the primary and general elections, and candidates must run for a designated position which precludes voters from using the technique of single-shot voting. According to the 1980 Census, only one circuit (the Atlanta Circuit) is majority black in population, and no circuit is majority black in voting age population. In addition, our information is that incumbency plays an important role in the electoral process for the superior court in that incumbents rarely are defeated. We understand that for about three-fourths of the current judges such incumbency was first established by their having been appointed to the bench.

We note further that most interracial judicial elections have occurred in the Atlanta Circuit, and these elections appear generally to exhibit a pattern of polarized voting. See also Busbee v. Smith, 549 F. Supp. 494, 499 (D. D.C. 1982), sum. aff'd, 459 U.S. 1166 (1983). No black ever has defeated a white incumbent superior court judge and, while black incumbents on the superior court also have been elected, they have never faced opposition. Only five blacks ever have served on the superior court in this circuit; three obtained gubernatorial appointments and two gained their seats in contests in which no incumbent was running (a circumstance which appears rarely to occur in superior court elections). The result is that only three of the eleven sitting judges are black although the circuit is 51 percent black in population.

Outside the Atlanta Circuit, only three blacks ever have served on the superior court, and these three all initially were appointed to the bench. Two of the three were then opposed in subsequent elections, and both elections appear to have been characterized by polarized voting. In addition, since there are few judicial elections to analyze outside the Atlanta Circuit, it is appropriate to consider contests for other elected offices in these circuits. Our review of a broad range of evidence in this regard indicates that polarized voting generally prevails in all of the superior court circuits now under review and there is a consistent lack of minority electoral success in at-large elections. Thus, it appears that, in the totality of the circumstances, black voters in these circuits have a limited opportunity to

elect their preferred candidates, even when blacks enjoy the advantages of incumbency by initially having been appointed to the bench.

Two features which are of particular import in the superior court electoral system are the majority vote and designated post requirements. It is well recognized that these requirements, acting in tandem, tend to minimize black voting strength in an at-large system. See, e.g., City of Rome v. United States, 446 U.S. 156 (1980). Indeed, there is substantial information indicating that the majority vote requirement was adopted in 1964 by the state precisely for that invidious purpose; the designated post requirement was adopted in the same legislation. The state has advanced no persuasive nonracial reason for continuing the use of these features, especially

since there appear to be alternative methods for electing superior court judges which would not similarly minimize and submerge black voting strength.

In addition, the state has not shown how its interests are served by circuit-wide elections in many of the circuits now at issue where the at-large election feature is in apparent violation of Section 2 of the Voting Rights Act. Thornburg v. Gingles, 478 U.S. 30 (1986). While a state may have more flexibility under Section 2 in justifying the at-large election of judges than it does with respect to other elected officials, we look to the submitting authority to proffer persuasive justifications. Here, it has not done so.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change

has neither a discriminatory purpose nor a discriminatory effect, and preclearance also must be denied where a clear violation of Section 2 is found to exist. See Georgia v. United States, 411 U.S. 526 (1973); Procedures for the Administration of Section 5 (28 C.F.R. 51.52 and 51.55(b)). In this connection, we in particular cannot ignore the substantial information which has come to our attention suggestive of the racially discriminatory purpose underlying the adoption of a major feature of the present system--the majority vote requirement and, possibly, the designated post as well. As the Supreme Court has noted, "an official action, . . ., taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the

[Voting Rights Act]." City of Richmond v. United States, 422 U.S. 358, 378 (1975).

In light of these considerations, therefore, I cannot conclude, as I must under the Voting Rights Act, that the state has carried its burden of showing that the expansion of an electoral system, which includes the restrictive majority vote and designated post features, through the additional judgeships under review here meets the preclearance standards. Accordingly, on behalf of the Attorney General I must decline to withdraw the June 16, 1989 objection to the 48 additional judgeships and the related changes concerning the dates on which terms of office commenced, and also must object to the ten judgeships established in 1989 and 1990, and the dates on which terms of office are to commence.

With respect to the creation of two additional circuits (Alcovy and Houston) and the district attorney positions therefor, our analysis indicates that these changes have met the preclearance standards. Accordingly, on behalf of the Attorney General, the objection to these changes is withdrawn.

As you are aware, the state retains the right under Section 5 to seek a declaratory judgment from the United States District court for the District of Columbia that the changes for which Section 5 clearance has been denied do not deny or abridge the right to vote on account of race or color. However, until a declaratory judgment is obtained or the objection is withdrawn, these changes continue to be legally unenforceable. 28 C.F.R. 51.10. In that regard, we would underscore the Court's observation in

Brooks v. State Board of Elections, C.A. No. CV288-146 (S.D. Ga.), that the objection in no way implicates the validity of the actions taken by the judges who have been serving in the unprecleared judgeships. Memorandum Opinion and Order, at 21-22 (Dec. 1, 1989). We are fully aware of the importance of the additional judgeships at issue to the proper functioning of the Georgia judicial system, and we will continue to work with the court and the parties in Brooks to assure that those needs are met consistent with the requirements of Section 5.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the State of Georgia plans to take regarding these matters. If you have any questions concerning this letter, you may feel free to telephone Mark A. Posner,

an attorney in the Voting Section (202/724-8388).

Because the status of the submitted changes is at issue in Brooks v. State Board of Elections, we are providing a copy of this letter to the court in that case.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable Phyllis A. Kravitch
United States Circuit Judge

Honorable B. Avant Edenfield
United States District Judge

Honorable Dudley H. Bowen, Jr.
United States District Judge

U. S. Department of Justice
Civil Rights Division
Office of the Assistant
Attorney General
Washington, D. C. 20536
June 16, 1989

Carol Atha Cosgrove, Esq.
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Dear Ms. Cosgrove:

This refers to acts of the Georgia General Assembly identified in Attachment A which established 48 additional superior court judgeships, specified the date on which the first full term of office commenced for each new judgeship, and established two superior court circuits and district attorney positions to serve those circuits in the State of Georgia, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Acts of 1965, as amended, 42 U.S.C. 1973c.

On June 27 and 28, 1988, we received from the State of Georgia the above-referenced voting changes along with a number of other changes in the superior court judicial system, which the State was submitting to the Attorney General for review under Section 5 of the Voting Rights Act. By letter dated August 26, 1988, a copy of which is attached, the Attorney General responded in a timely manner by preclearing several of the changes and indicating, with respect to the voting changes here at issue, that "the information provided [was] insufficient to enable the Attorney General to determine that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Accordingly, and in conformity with our Section 5 guidelines,

we requested that certain items of additional information be provided. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.37). At that time we noted the caution in our guidelines at 28 C.F.R. 51.40 that if the State did not provide the requested information within sixty days of the request, the Attorney General could interpose an objection to the submitted changes consistent with the burden of proof placed upon the submitting authority.

Subsequently, on February 1, 1989, we received a partial response to the request for additional information by a letter dated January 25, 1989, in which the State represented that it was "continuing to attempt to acquire the voluminous information you have requested, and will forward it to you as it is compiled." When, by March 31, 1989, we had not received any

further information, we sent a letter to you confirming our understanding that the State was proceeding to obtain the remaining information requested. See 28 C.F.R. 51.37(d). To date, no such further information has been provided nor have we been informed that it is unavailable.

Indeed, we now understand it to be the intention of the State not to provide the remainder of the information requested in our August 26, 1988 letter until after trial is conducted in certain litigation which is pending in the federal district court under Section 2 of the Act, 42 U.S.C. 1973, and the Constitution even though the State continues to implement all the submitted changes without the required preclearance.

It has long since been established that changes subject to the preclearance requirements of Section 5 are legally

unenforceable absent such clearance. See, e.g., Connor v. Waller, 421 U.S. 656 (1975). To obtain that clearance, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discrimination effect. See Georgia v. United States, 441 U.S. 526 (1973); see also 28 C.F.R. 51.52. In failing to provide the Attorney General with the information necessary for the proper evaluation of the instant changes, the State clearly has failed to sustain its burden in the present case. Under those circumstances, then, the Attorney General has no alternative but to interpose an objection to the further implementation of the changes concerning the election of superior court judges which are listed in Attachment A.

Of course, we stand ready and willing to reconsider this determination should the State seek such reconsideration and provide the information which we have outlined as necessary to that action. See 28 C.F.R. 51.45. In addition, as provided by Section 5, the State has the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the referenced changes remain legally unenforceable. 28 C.F.R. 51.10.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course

of action the State of Georgia plans to take with respect to this matter. If you have any questions, feel free to call Mark A. Posner (202/724-8388), an attorney in the Voting Section. Because the Section 5 status of the submitted changes is at issue in Brooks v. Glynn County, Georgia Board of Elections, C.A. No. CV 288-146 (S.D. Ga.), we are providing copies of this letter to the court and the other counsel of record in that case.

Sincerely,

James P. Turner
Acting Assistant
Attorney General
Civil Rights Division

cc: Honorable Phyllis A. Kravitch
United States Court of Appeals

Honorable B. Avant Edenfield
United States District court

Honorable Dudley H. Bowen, Jr.
United States District Court

Counsel of record

Attachment A

Act (Year)	Judicial Circuit
340 (1977)	Alapaha
849 (1972)	Alcovy
1082 (1978)	Alcovy
802 (1971)	Atlanta
850 (1974)	Atlanta
845 (1984)	Atlanta
810 (1971)	Atlantic
860 (1982)	Atlantic
457 (1971)	Augusta
1336 (1986)	Augusta
101 (1967)	Brunswick
1078 (1980)	Brunswick
743 (1987)	Brunswick
616 (1969)	Chattahoochie
336 (1977)	Chattahoochie
1209 (1980)	Cordele
849 (1974)	Coweta
1350 (1980)	Coweta
858 (1974)	Dougherty
725 (1980)	Dublin
515 (1979)	Eastern
503 (1975)	Flint
293 (1977)	Griffin
315 (1987)	Griffin
303 (1969), as amended by Act 587 (1971)	Houston
851 (1984)	Houston
772 (1981)	Macon
244 (1977)	Middle
247 (1977)	Northern
746 (1968)	Ocmulgee
479 (1979)	Ocmulgee
1108 (1976)	Oconee
1076 (1978)	Ogeechee
124 (1981)	Pataula
183 (1969)	Southern

115 (1975)	Southern
1017 (1978)	South Georgia
101 (1981)	Southwestern
100 (1967)	Stone Mountain
1194 (1972)	Stone Mountain
1339 (1986)	Stone Mountain
911 (1988)	Stone Mountain
978 (1980)	Tifton
123 (1981)	Toombs
857 (1974)	Waycross
107 (1981)	Waycross
996 (1976)	Western

28 U.S.C. §1253

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Section 5 of the Voting Rights Act of 1965

42 U.S.C. §1973c

Whenever a State or political subdivision with respect to which the prohibitions set for in section 1973b(a) of this title based upon determination made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualifica-

tion or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will

not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval

within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action

under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Supreme Court, U.S.
FILED
SEP 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-272

In The

Supreme Court of the United States

October Term, 1990

TYRONE BROOKS, LANETT STANLEY, BILLY McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, and ERCEL BALDWIN,

Appellants,

versus

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 2

ARGUMENT 11

I. ASSUMING THAT THE DISTRICT COURT WAS CORRECT IN HOLDING THAT A "COVERED CHANGE" OCCURRED MERELY BY THE ADDITION OF NEW SUPERIOR COURT JUDGESHIPS, WHICH WERE ELECTED PURSUANT TO PROCEDURES THAT WERE IN EFFECT PRIOR TO NOVEMBER 1, 1964, THE RELIEF PRESCRIBED BY THE DISTRICT COURT WAS WELL WITHIN THE COURT'S EQUITABLE DISCRETION 11

A. The Remedy that Appellants Requested Would Be Of No Benefit to Minority Voters And, For That Reason Alone, the District Court's Refusal to Eliminate 48 Superior Court Judgeships Instanter was Not Error.. 11

B. None of The Past Decisions of This Court Support the Appellants' Extraordinary Request for Relief in This Appeal 13

C. This Court Has Repeatedly Held That, In Fashioning Section 5 Relief, District Courts Must Recognize Legitimate Interests of the States, and Those Interests Here Require That the Judgeships at Issue Not be Terminated Instanter 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Allen v. State Board of Elections, 393 U.S. 544 (1969)..14, 15

Beer v. United States, 425 U.S. 130 (1975) 18

Berry v. Doles, 438 U.S. 190 (1978)..... 14

City of Lockhart v. United States, Case No. 81-802 (U.S. filed, October 1982)..... 19

City of Rome v. United States, 446 U.S. 156 (1980) 14

Georgia v. United States, 411 U.S. 526 (1973) 14

Georgia State Board of Elections v. Brooks, Case No. 90-322 (U.S. docketed August 22, 1990) 10

Haith v. Martin, 477 U.S. 901 (1986) 16

Haith v. Martin, 618 F.Supp. 410 (D.N.C. 1985)..... 16

Kirksey v. Allain, Civil Action No. J85-0960(B) (S.D. Miss., April 3, May 28, and July 25, 1986) 16

McDaniel v. Sanchez, 452 U.S. 130 (1981)..... 20

Morris v. Gressette, 432 U.S. 491 (1977) 15

Perkins v. Matthews, 400 U.S. 379 (1971) 14, 16, 17

South Carolina v. Katzenbach, 383 U.S. 301 (1965)..... 15

State of Georgia v. Thornburgh, Civil Action No. 90-2065 (D.D.C., complaint filed August 24, 1990)..... 9

Upham v. Seamon, 456 U.S. 37 (1982) 20, 21

White v. Weiser, 412 U.S. 783 (1973) 20

Wise v. Lipscomb, 437 U.S. 535 (1978)..... 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

42 U.S.C. § 1973c 2, 15, 19

O.C.G.A. § 15-6-4.1 4

O.C.G.A. § 15-6-8 3

O.C.G.A. § 21-2-135 4

O.C.G.A. § 21-2-501 4

CONSTITUTIONS:

Ga. Const. Art. VI, Sec. VII, Par. II(a) 7

OTHER AUTHORITIES:

28 C.F.R. § 51.18(c) 14

52 Fed. Reg. 488-89 (1987) 14

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MOTION TO DISMISS OR AFFIRM

Appellees hereby move that the instant appeal be dismissed or that the District Court order be affirmed insofar as it relates to the issue of relief.

In making this motion, appellees note that they have taken an appeal from the District Court's judgment in this action, and that appeal has been docketed in this Court as Case No. 90-332. A decision by this Court in favor of the appellants there (the present appellees) would render moot the instant appeal.

The grounds of the present motion, to the extent that this Court finds it necessary to reach the issues presented in this appeal, are that: (1) the questions raised by the present appeal are so insubstantial that further argument is unwarranted; and (2) to the extent the District Court correctly determined the underlying substantive issues in this case, the relief entered was well within the discretion vested in the court.

STATEMENT OF THE CASE

Proceedings Below. The complaint in this action, which was filed on July 13, 1988, includes four causes of action. The first, which is the only one involved in this appeal, alleges that the addition of new superior court judgeships in the State of Georgia requires preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, even though the method of electing those judges has not been changed.

The plaintiffs filed motions for a preliminary injunction and summary judgment on their Section 5 claims,

and on December 1, 1989, a three-judge district court, in a split decision, entered an order holding that all superior court judgeships added subsequent to November 1, 1964 (the effective date of Section 5 of the Voting Rights Act) required preclearance. The Honorable Phyllis Kravitch and B. Avant Edenfield comprised the majority of the court. The Honorable Dudley Bowen, Jr., dissented.

The District Court directed the defendants to complete a Section 5 submission to the Department of Justice. The State promptly did so, and on April 25, 1990, the Department of Justice issued its opinion. The Department objected to the addition of all new judgeships in any area of the State of Georgia where there was a significant black population.

The District Court then entered orders on May 29, 1990 and June 25, 1990 providing final relief on the Section 5 claim.

Statement of Facts. Since the State of Georgia was founded, the superior courts have been the State's trial courts of general jurisdiction. The superior courts have exclusive jurisdiction over equity cases, felony cases, domestic and custody cases, and certain other classes of cases. They also exercise a wide form of appellate and certiorari jurisdiction over inferior tribunals, administrative bodies, and local government bodies. *See* O.C.G.A. § 15-6-8.

Each individual superior court seat in Georgia is authorized by an act of the legislature. As of November 1, 1964, the effective date of Section 5 of the Voting Rights Act, the General Assembly had authorized 59 superior court judgeships throughout the State. From 1965 through

the 1988 session of the General Assembly, an additional 77 superior court judgeships were created. The addition of these judgeships came about solely because of the increased caseload of the courts, particularly in the number of felony cases.

Each of those additional judgeships was filled after enactment, and regular elections were then held at the expiration of the incumbents' terms. All of the new judgeships were elected pursuant to the same procedures that were used for the preexisting positions. Each superior court judgeship continued to be nominated by all the voters residing in the respective circuits and a majority of the vote was required for election.[1] *See* O.C.G.A. §§ 15-6-4.1; 21-2-135; 21-2-501. Each new judgeship was simply a replication of what had existed before.

From 1965 to 1988, no submission of any of these new judgeships was made under Section 5, either to the Department of Justice or to the District Court for the District of Columbia. It was the understanding of the State of Georgia that the addition of new judgeships under the circumstances presented did not constitute an "electoral change" which required preclearance. *Neither the plaintiffs, the Department of Justice, nor any other person suggested otherwise during this 24 year period.*

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[1] There were a few instances in which new circuits were created out of old circuits since November 1, 1964, but each of these changes has been precleared, and they have no bearing on this appeal. Nomination and election of judges became nonpartisan in 1983, which is also a precleared change that has no bearing on the present appeal.

The State of Georgia believed that preclearance was not required for the addition of new judgeships because there had been no change in the method of electing judges. Since each new judgeship was simply a duplication of what had existed before, minority voters could not conceivably have been disadvantaged in any way by the addition of these new judgeships. Neither this Court nor any other court had ever held that the mere addition of a new judgeship required separate preclearance where the judge was to be elected by mandatory state-wide laws that preexisted Section 5. The District Court here acknowledged this fact and noted that, "before the issuance of our December 1989 order, the question of whether the new judgeships were covered by Section 5 was in dispute." (App. 88, n. 1) Judge Bowen further elaborated on this point in his dissent:

> [I]n the laborious research which the parties and this Court have performed, there is no binding precedent that the mere increase in the number of judges in an existing, otherwise validly composed judicial circuit, is a change in a "standard, practice, or procedure with respect to voting."
>
> The majority believes that a duplication or other multiplication of the *status quo*, by the mere addition of a judgeship, is a covered change because of a perceived "potential for discrimination" therein. The proffered potential for discrimination is imaginary. This potential for discrimination (a) presumes the existence of factors which are not grounded in fact; and (b) presupposes that some novel and ingenious method might be crafted to accommodate the wishes of plaintiffs and their class whenever a new judgeship is needed. While it is true that only a potential for discrimination, not a discriminatory purpose or effect, must be shown,

> the acceptance of the genuineness of the potential for discrimination proffered by the plaintiffs in this case requires a degree of credulity which I cannot muster, even under the liberal construction principles of the Voting Rights Act. (App. 64-65)

When it was suggested in 1988 that statutes adding new judgeships in Georgia might require Section 5 preclearance, the State, out of an abundance of caution, submitted the 77 judgeships added from 1965 through 1988.[2] This submission was made to the Department of Justice on June 22, 1988. Immediately thereafter, on July 13, 1988, the plaintiffs chose to file their complaint and put before the District Court the question of whether the addition of new judges alone constituted "covered changes." The State therefore declined to pursue further the June 1988 submission until the District Court ruled on this issue. When the District Court held on December 1, 1989, in its 2-1 ruling, that covered changes were involved and preclearance was required, the State of Georgia completed its earlier submission.[3]

The undisputed evidence shows that there has been no discrimination in either the election or the appointment of superior court judges in the State of Georgia. While plaintiffs complain that the percentage of superior

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[2] In 1989 and 1990 together, an additional 11 superior court judgeships were authorized by the General Assembly. Ten of those positions have never been filed and remain vacant today on account of the present litigation.

[3] In the interim, the Department precleared 31 statutes creating new judgeships in those areas of the State that did not have a significant black population.

court judges who are black is less than the percentage of the general population that is black, that difference is due entirely to the fact that the percentage of qualified persons who are black is much less than the percentage of blacks in the general population.[4]

At the time of the District Court's order (and today), six of the 137 incumbent superior court judges were black (*i.e.*, 4.4 percent). This number *exceeds* the total percentage of black lawyers in the State of Georgia (three percent), and it significantly exceeds the percentage of lawyers who are black and who satisfy the minimum seven-year practice requirement for serving as a superior court judge.

The lower court did not find, nor could it have found, that the method of electing superior court judges had somehow discriminated against black judicial candidates in Georgia. To the contrary, there had been nine judicial elections in which black and white candidates had opposed one another at the time of the District Court's decision. These included a state-wide election for the Court of Appeals, several superior court elections, and several state court elections. *The black candidate won seven of these nine judicial elections.* In fourteen additional elections, black candidates for state and superior court judgeships had been elected without opposition. (In the most recent judicial elections in the State, which occurred on July 17, 1990, two more black state-wide candidates

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[4] The Georgia Constitution requires that superior court judges be members of the Bar for seven years or more. *See* Ga. Const. Art. VI, Sec. VII, Par. II(a). Plaintiffs have not alleged that this requirement is discriminatory.

were successful, one for the Court of Appeals, and one for the Supreme Court; each had white opposition.)

Nor could anyone rationally suggest that there has been racial discrimination in the appointment process, which is the route by which approximately 70 percent of the present superior court judges in Georgia initially took office. These appointments are made by the Governor upon the recommendation of the Judicial Nominating Commission (JNC). When there is a vacancy, the JNC publicizes that fact and receives applications from anyone who chooses to apply. The evidence in the record shows, without contradiction, that black lawyers who have applied for superior court positions have enjoyed a success rate approximately 50 percent *higher* than that of white applicants.

Notwithstanding the fact that the method of electing superior court judges remained unchanged, and notwithstanding the absence of any evidence of discrimination in the election or appointment of superior court judges in Georgia, the Department of Justice objected to the creation of every new judgeship in each circuit that had a significant black population. The Department's April 25, 1990, objection letter did not suggest that the mere addition of these judgeships was somehow racially discriminatory. Rather, the principal basis of the objection was the allegation that Georgia's state-wide majority vote requirement might be discriminatory. (App. 108-109) As a matter of fact, however, that requirement had been adopted *before* the effective date of Section 5, and it therefore had not been submitted to the Department of Justice for review, nor could it have been. The Department also appears to have questioned circuit-wide voting, but that,

too, is a practice that predates the November 1, 1964, Section 5 benchmark for determining what is a "changed" electoral practice. (App. 109)

The District Court's Relief. Based on the Department of Justice's April 25, 1990 letter, the District Court entered final relief on plaintiffs' motions. First, the court enjoined the upcoming 1990 elections, and all future elections, for any of the new judgeships that had not been precleared. Second, the court enjoined the State of Georgia from "activating," by appointment or election, any of the 10 new, but still unfilled, judgeships that were objected to that had been created in the 1989 and 1990 sessions of the General Assembly. Third, the court provided that all objected to judgeships that had been enacted from 1965 through 1988, which already had incumbent judges prior to the filing of plaintiffs' complaint and motion for injunctive relief, would become *vacated* and *cease to exist*, unless the State of Georgia is successful in obtaining preclearance in a judicial action filed in the District Court for the District of Columbia.[5] If the declaratory judgment preclearance action were unsuccessful, the 25 judgeships whose incumbents' terms end in 1992 would cease to exist at that time; the 23 judgeships whose incumbents' terms would otherwise have ended in 1990 would cease to exist 150 days after the conclusion of the declaratory judgment action. Finally, the District Court provided that

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[5] In order to satisfy this provision of the District Court's order, the State was required to file a complaint seeking judicial preclearance within 90 days of the District Court's June 25, 1990 order, or by September 23, 1990. Such an action has been filed. *See State of Georgia v. Thornburgh*, Civil Action No. 90-2065 (D.D.C., complaint filed August 24, 1990).

all incumbent judges could continue to hold their offices pending an appeal to this Court by the State of Georgia. (App. 89-90)

The State of Georgia's Appeal in Case No. 90-322. The State defendants, the appellees in the instant appeal, have filed a separate appeal to this Court in which they pursue the specific question which the District Court acknowledges to be "in dispute." (App. 88, n. 1) *See Georgia State Board of Elections v. Brooks,* Case No. 90-322 (U.S., docketed August 22, 1990). In that case, the State of Georgia asserts that the District Court erred in holding that Section 5 preclearance was required at all in this case, so that the judgment of the court should be reversed *in toto* for that reason. The State of Georgia contends there that preclearance was not required for any of the new judgeships at issue because the method of electing those judgeships was not changed in any way. Since the new judgeships were elected pursuant to the very practices mandated by Section 5 – *i.e.,* those practices that were in effect on November 1, 1964 or which have received subsequent preclearance – separate Section 5 preclearance should not be necessary.

As noted, Judge Bowen agreed with the contentions of the State of Georgia in his dissent on this issue. If this Court similarly agrees with the State of Georgia's contentions on appeal in Case No. 90-322, all issues in the present appeal would become moot. The present issues relate to questions of relief that would arise only if one first assumes that Section 5 preclearance is required.

ARGUMENT

I. ASSUMING THAT THE DISTRICT COURT WAS CORRECT IN HOLDING THAT A "COVERED CHANGE" OCCURRED MERELY BY THE ADDITION OF NEW SUPERIOR COURT JUDGESHIPS, WHICH WERE ELECTED PURSUANT TO PROCEDURES THAT WERE IN EFFECT PRIOR TO NOVEMBER 1, 1964, THE RELIEF PRESCRIBED BY THE DISTRICT COURT WAS WELL WITHIN THE COURT'S EQUITABLE DISCRETION.

A. The Remedy that Appellants Requested Would Be Of No Benefit to Minority Voters And, For That Reason Alone, the District Court's Refusal to Eliminate 48 Superior Court Judgeships Instanter Was Not Error.

The District Court here enjoined all future elections for unprecleared judgeships, including elections scheduled for 1990 for which qualifying had already occurred at the time of the court's May 29, 1990 order. The District Court also enjoined the State of Georgia from taking any action to fill, by election or appointment, those judgeships that were objected to, but had not yet been filled, which were enacted in 1989 and 1990. Appellants can take no issue with this very harsh relief.

Appellants' only quarrel is with the District Court's order providing that incumbent judges may continue in office pending the outcome of a Section 5 declaratory judgment action in the District of Columbia (if the latter remains necessary after this Court's decision in the State's appeal in Case No. 90-322). Appellants contend that the District Court erred in "permitting the judges to remain in office until the end of their terms," and that the District Court was required as a matter of law to declare "that the judgeships be immediately voided and vacated." (J.S. at 33-34, n. 13)

At the outset, it is questionable whether appellants have even preserved this argument for appeal. In the District Court, they acknowledged that the court had the discretion to allow the objected to judgeships to continue for some period of time, even without the State of Georgia pursuing a Section 5 preclearance action in the District of Columbia. Plaintiffs expressly stated that allowing incumbent judges to serve out their terms, through either 1990 or 1992, was "fully consistent with . . . Section 5 jurisprudence." (Plaintiffs' Brief in Opposition to Defendants' Motion for Rehearing or Reconsideration, at 1)

Assuming that appellants' present contention can be raised in this Court, however, it is clearly a contention that cannot be justified. It would be unprecedented to impose the kind of radical relief appellants insist on if such relief would not provide any benefit to the plaintiffs or any minority voter or potential candidate. Yet that is the very situation that exists here.

Nowhere have the plaintiffs been able to suggest how the immediate elimination of nearly half of the State's superior court judgeships, judgeships which have existed without objection for up to a quarter of a century, would advance minority voting rights. Eliminating these 48 judgeships would not remedy any alleged past discrimination, and the District Court's injunction against future elections, until there is preclearance, guarantees against even the most remote possibility of voting discrimination.

The need of all citizens of the State of Georgia, both black and white, to have a functioning judiciary is undisputed. There being no benefit to the extraordinary

injunction appellants seek, the tremendous disruption such relief would cause cannot possibly be justified.

B. None of The Past Decisions of This Court Support the Appellants' Extraordinary Request for Relief in This Appeal.

In the District Court, the plaintiffs initially agreed that that court had the discretion to allow incumbent superior court judges to serve out their terms, through either the end of 1990 or 1992, as the case may be. Appellants' complaint on appeal is with the District Court's modification of its order, which further permitted incumbent judges to continue in office pending resolution of the State of Georgia's Section 5 preclearance action in the District Court for the District of Columbia. Appellants' inconsistent positions cannot be reconciled. Having once admitted that incumbent judges could continue in office for up to two and one-half more years, even in the absence of any preclearance litigation in the District of Columbia, appellants are hard pressed to justify their present claim that the District Court was somehow duty bound as a matter of law to vacate all offices *instanter*.

The plaintiffs' appeal here seeks radical and unprecedented relief. Never before has this Court held that public officers, elected over the prior quarter of a century without any objection or complaint from the plaintiffs or the Department of Justice, should be eliminated from office, without any provision for their successors being elected, while the very question of Section 5 preclearance is being litigated in a declaratory judgment action. Allowing

incumbents to remain in office pending Section 5 preclearance litigation is customary, *see, e.g., City of Rome v. United States*, 446 U.S. 156 (1980), and there is no reason to deviate from the established practice here.

The principal cases relied upon by appellants, *Berry v. Doles*, 438 U.S. 190, 192-93 (1978) (per curiam); *Georgia v. United States*, 411 U.S. 526, 541 (1973)[6]; *Perkins v. Matthews*, 400 U.S. 379, 396 (1971); and *Allen v. State Board of Elections*, 393 U.S. 544 (1969), provide appellants with no support. These cases did not even involve this question. There was no indication in any of those decisions that the covered jurisdiction had any intention or desire to pursue judicial preclearance. At most, there was a possibility that the jurisdiction might seek administrative preclearance from the Attorney General. Even there, this Court held that that should be allowed before the District Court should consider any relief, other than simply enjoining future elections. *See, e.g., Berry v. Doles, supra*. Since this Court has indicated that a district court should normally stay its hand to allow a covered jurisdiction to seek preclearance by the Department of Justice, such deference surely should be given to proceedings in the District Court for the District of Columbia under circumstances such as those presented by this case.

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[6] In *Georgia v. United States*, the defendants were allowed to use a new reapportionment for the 1972 elections even though *prior* to that election the District Court had found it to be a covered change and it had been objected to. The Department of Justice's own regulations and comments acknowledge that district courts may allow unprecleared election changes to be used even prospectively. *See* 28 C.F.R. §51.18(c) and 52 Fed. Reg. 488-89 (1987).

Appellants put far too much weight on the existence of an administrative objection letter from the Department of Justice. They argue in their Jurisdictional Statement as if the Department's letter constitutes a definitive determination that the method of electing Georgia's superior court judges is, in fact, improper under Section 5. Appellants are incorrect in this regard.

To the contrary, a declaratory judgment before a three-judge court in the District of Columbia is the basic means for obtaining preclearance. *South Carolina v. Katzenbach*, 383 U.S. 301 (1965). Administrative preclearance by the Attorney General was engrafted on the statute late in the legislative process almost as an afterthought as the bill approached enactment. *Morris v. Gressette*, 432 U.S. 491, 503-04 (1977). It was understood that Attorney General preclearance would usually arise only in simple, noncontroversial cases. *Id.* The determination by the Attorney General here will receive no weight of any sort in the judicial preclearance action that is now pending in the District of Columbia. *See* 42 U.S.C. §1973c. That action is an entirely *de novo* one.

All of the factors that have been found relevant by this Court in its past decisions concerning Section 5 remedies weigh heavily in favor of allowing Georgia's incumbent superior court judges to remain in office pending litigation of the Section 5 claims. In *Allen v. State Board of Elections, supra*, for example, this Court refused to grant anything but prospective relief because the application of Section 5 to the facts of that case was an issue "subject to rational disagreement." 393 U.S. at 572. In the present case, as all three members of the District Court

below acknowledged, there is very legitimate and "rational disagreement" over whether the addition of new superior court judges constitutes a covered "change" where those judges are all elected by procedures that are consistent with, and required by, the Section 5 prohibition against using changed methods of election.[7]

Given these circumstances, the District Court's prohibition against future elections alone would have satisfied Section 5, even if incumbent judges were allowed to hold over indefinitely. That relief would have been identical to what was entered in another Section 5 case involving judges. *See Kirksey v. Allain*, Civil Action No. J85-0960(B) (S.D. Miss., April 3, May 28, and July 25, 1986). The District Court here went much further in requiring that the State of Georgia pursue judicial preclearance in order to allow incumbent judges to continue in office.

Perkins v. Matthews, supra, similarly supports the appellees' position here. In determining whether anything other than prospective injunctive relief should be entered in the absence of Section 5 preclearance, this Court noted that a district court should consider "whether it was reasonably clear at the time of the election that the changes were covered by § 5." 400 U.S. at

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[7] Appellants suggest that the question of preclearance was decided by this Court's summary affirmance in *Haith v. Martin*, 477 U.S. 901 (1986), but they misstate the Court's holding in *Haith*. *Haith* did not touch upon the question whether the mere addition of a new judgeship, *without any change in the method of election*, required separate preclearance. In *Haith*, the actual method of electing new judges had been changed, and those changes were enjoined pending Section 5 preclearance. *Haith v. Martin*, 618 F.Supp. 410, 414 (D.N.C. 1985).

396. If not, any relief should be limited accordingly. *Perkins* also endorsed the very procedure adopted by the District Court in this case:

> In certain circumstances, for example, it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials failed to do so or if the required federal approval was not forthcoming. 400 U.S. at 396-397.

This Court went on in *Perkins* to hold that the district court should be principally responsible for determining the proper remedy. *Id.* at 397. In making that determination, the trial court should consider all "other factors [that] may be relevant, such as the nature of the changes complained of." *Id.* at 396. All of the "other factors" in this case weigh heavily in favor of the appellees here. As noted above, the elimination of all incumbent judges *instanter* would not advance the cause of minority voters in any way. Of all the elections plaintiffs now ask this Court to void, there is not a single one in which plaintiffs suggest that a black candidate lost because of any allegation of discrimination. Black candidates have done very well in judicial elections, and the evidence is undisputed that blacks are fairly represented on Georgia's superior courts in proportion to the percentage of blacks who are members of the qualified pool of lawyers eligible to serve.

Furthermore, the plaintiffs here seek the actual *elimination* of the offices at issue, which is a form of relief so radical that it has never even been mentioned in previous decisions of this Court. In past decisions, "retroactive" relief was conceived of as a possibility where an election

might be set aside and then conducted under different procedures that were consistent with Section 5. Such relief would not have resulted in the elimination of any incumbent public offices. Rather, those offices would have continued in existence with the officeholders' successors simply chosen by the voters under a court-ordered election. The havoc that would be caused by eliminating the offices themselves, as appellants demand, weighs heavily against their claim.

Finally, in considering the Department of Justice's objection, one must necessarily conclude that the State of Georgia has an excellent chance of obtaining Section 5 preclearance in its declaratory judgment action in the District of Columbia, even in the event that the State were not successful in its appeal to this Court in Case No. 90-322. The Department's objection in this case is a striking and questionable departure from its past administrative decisions and from this Court's rulings. The addition of the judgeships at issue here cannot possibly be characterized as either "retrogressive" or "intentionally discriminatory," which would be required to justify an objection under Section 5. *Beer v. United States*, 425 U.S. 130 (1975). To the contrary, since each new judgeship was an exact replication of the preexisting judgeships in the respective circuits, and elections were conducted for new judgeships just as they had been for the preexisting ones, there was no conceivable decrease or change in minority voting strength. It is thus impossible as a matter of law to find the kind of "retrogression" of minority voting strength proscribed by Section 5. *Beer v. United States, supra.*

The Department's objection rests in substantial part on Georgia's mandatory majority vote statute, which was

passed and in effect before November 1, 1964. (App. 108-09) That statute, which requires majority voting in all elections for State officers, including superior court judges, is not even subject to Section 5 review because it preceded the statute's November 1, 1964 trigger date. In an apparent effort to buttress its unprecedented extension of Section 5 review to reach pre-November 1, 1964 laws, the Department suggested that this statute might violate the separate Section 2 of the Voting Rights Act, 42 U.S.C. §1973. (App. 109) As the Department of Justice has represented to this Court before, however, the recently amended Section 2 has nothing whatsoever to do with Section 5 review, which remains limited to a determination of the purpose and "retrogressive effect" of changes that have been made subsequent to November 1, 1964. *See* Reply Brief for the United States, *City of Lockhart v. United States*, Case No. 81-802 (U.S., filed October 1982).

The strength of the State of Georgia's claim for preclearance is also shown by the fact that the Department of Justice issued a ruling in the State of Alabama diametrically opposite to its decision here. In Alabama, where judges are elected exactly as they are in the State of Georgia, every single one of Alabama's new judgeships that were enacted since November 1, 1964 were recently precleared by the Attorney General. (*See* Letter dated April 27, 1987 from Department of Justice to David R. Boyd, Def. Ex. B to Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction.)

In light of all of these factors, which the District Court was obligated to consider, one cannot argue that the court erred in allowing the State of Georgia to seek

judicial preclearance while incumbent judges remained in office.

C. This Court Has Repeatedly Held That, In Fashioning Section 5 Relief, District Courts Must Recognize Legitimate Interests of the States, and Those Interests Here Require That the Judgeships at Issue Not be Terminated Instanter.

Appellants ignore the repeated holding of this Court that, in fashioning relief in a Section 5 case, a district court must always take into consideration the legitimate objectives of the State. Any injunction can be no broader than what is necessary to remedy any violation of the Act, and the articulated policies and objectives of the State must be respected and given effect wherever possible. *Upham v. Seamon*, 456 U.S. 37, 43 (1982); *McDaniel v. Sanchez*, 452 U.S. 130 (1981); *Wise v. Lipscomb*, 437 U.S. 535 (1978); *White v. Weiser*, 412 U.S. 783 (1973).

Here, it is undisputed that the State has had a real and compelling need for additional new superior court judgeships since November 1, 1964. Defendants introduced abundant evidence that eliminating those judgeships would be catastrophic for the criminal and civil justice systems in the State of Georgia. The appellants did not introduce one shred of contrary evidence.

In allowing incumbent judges to continue in office pending Section 5 preclearance litigation, while at the same time enjoining any future elections that have not been precleared, the court was merely following its duty to give some deference to the clear, legitimate policies of

the State of Georgia that have been unambiguously articulated by the General Assembly.

Nothing in the objection letter from the Department of Justice would suggest that the increase in the number of Georgia's judges was somehow improper or unnecessary. That being the case, the District Court was duty bound to devise an order that intruded into these acknowledged interests of the State as little as possible. *Upham v. Seamon, supra.*

CONCLUSION

For the foregoing reasons, appellees respectfully request that this Court either dismiss this appeal or affirm the District Court's order insofar as it relates to the issue of relief.

Respectfully submitted,

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No. 90-272

SEP 24

JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

TYRONE BROOKS, LANETT STANLEY, BILLY McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, AND ERCEL BALDWIN,

Appellants,

versus

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

Page

ARGUMENT

I. There is No Foundation in Law Or Fact for An Order Permitting Unprecleared Judges to Remain In Office After a Section 5 Objection on the Merits 2

II. Plaintiffs Have Consistently Sought An Order Declaring The Unprecleared Judgeships To Be Null and Void, In Accordance With Section 5 Jurisprudence 2

III. Vindication Of Section 5 Benefits All Protected Persons, Including the Instant Plaintiffs 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES:

Allen v. State Board of Elections, 393 U.S. 544 (1969) 3, 7

Hathorn v. Lovorn, 457 U.S. 255 (1982) 2

NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985) 5

Perkins v. Matthews, 400 U.S. 379 (1971) 3, 5, 7

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 7

OTHER AUTHORITIES:

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c ..... *passim*

S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982) 5

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

ARGUMENT

I. THERE IS NO FOUNDATION IN FACT OR LAW FOR AN ORDER PERMITTING UNPRECLEARED JUDGES TO REMAIN IN OFFICE AFTER A SECTION 5 OBJECTION ON THE MERITS

Defendants' Motion to Dismiss or Affirm is grounded not in law, but in purported "equitable considerations" spun out of whole cloth. There is no foundation in the record for Defendants' assertions that the method of electing superior court judges does not discriminate against black citizens (Motion, 6-8), nor that an order voiding the unprecleared judgeships "would be of no benefit to minority voters" (Motion, 11). Further, there is no basis in law for the State's claim that its need for additional judges overrides the preclearance requirements of Section 5 (Motion, 20-21). Finally, whatever discretion the district court possessed to consider "equitable factors" in shaping a remedy, that discretion ended with the Attorney General's objection on the merits. Having sought and been denied preclearance, the State cannot rely on the "hardships" created by its own violation of law to avoid the affirmative relief mandated by this Court.

II. PLAINTIFFS HAVE CONSISTENTLY SOUGHT AN ORDER DECLARING THE UNPRECLEARED JUDGESHIPS TO BE NULL AND VOID, IN ACCORDANCE WITH SECTION 5 JURISPRUDENCE

Plaintiffs have consistently argued that the appropriate remedy for the State's violation of Section 5 is to declare the unprecleared judgeships null and void, in accordance with established law. *Hathorn v. Lovorn*, 457

U.S. 255, 270 (1982); *Perkins v. Matthews*, 400 U.S. 379, 397 (1971); *Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969).

At the time they first filed their Motion for Preliminary Injunction under Section 5, Plaintiffs requested that the court:

> (b) enjoin any further implementation of the statutes . . . until and unless preclearance is obtained from the United States Attorney General;
>
> (c) void all appointments made and elections held for these unprecleared judicial circuits and posts;[1]
>
> (d) in the alternative, require Defendants to complete their submission under Section 5 within thirty (30) days from the date of this motion . . .

Plaintiffs' Motion for Preliminary Injunction, p. 4 (April 4, 1989). Plaintiffs have never waivered from that position.

On December 1, 1989, the three-judge court, in the exercise of its discretion, entered an order affording defendants thirty days within which to complete their Section 5 submission. 36a-37a. In the event defendants failed to do so, the court provided that the unprecleared judgeships would become null and void at the conclusion of the incumbent's term of office. The court also enjoined

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[1] The statutes at issue create the new elected position and its numbered election post, as well as specifying the date of election and method of interim selection. Until the statutes are precleared, they cannot lawfully be implemented, and the judgeships do not legally exist. It is for that reason that the positions themselves, and not just the methods by which they are elected, are null and void.

any futher appointments to unprecleared positions, including any vacancies which might occur in those implemented but unprecleared seats. 41a.

Defendants immediately sought reconsideration of that remedial order, challenging the court's authority to provide "for the elimination of judgeships." *Brief in Support of Defendants' Motion, In the Alternative, for Rehearing, Reconsideration, Clarification, Or Relief from the December 1, 1989 Order of the Court, Or To Alter and Amend That Order,* p. 2 (December 14, 1989). Plaintiffs argued in reply, "[t]his Court's remedial order is fully consistent with, and required by, Section 5 jurisprudence." *Plaintiffs' Brief in Opposition to Defendants' Motion for Rehearing or Reconsideration,* p. 1.[2]

On April 25, 1990, the Attorney General entered an objection *on the merits* to the establishment of a total of 58 superior court judgeships. On May 29, 1990, the three-judge court granted Defendants' Motion for Reconsideration, dramatically altering its previous order as to remedy. The court vacated those portions of its order that

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[2] It is this language which Defendants contend constitutes an abandonment of Plaintiffs' right to contest the court's final order. That is simply untrue. Plaintiffs were merely supporting the three-judge court's authority to declare unprecleared positions vacant and void. They neither addressed nor condoned that aspect of the order that permitted judges to remain in office until the end of their terms.

More fundamentally, however, the December 1, 1989 order was entered before the objection on the merits by the Attorney General. Once Defendants have been afforded the opportunity to obtain preclearance, and it has been *denied*, immediate affirmative relief is required. See discussion at J.S. 27-32.

declared unprecleared judgeships void at the conclusion of the incumbent's term. It ordered instead that those positions could continue to exist indefinitely, until and unless preclearance was refused by the United States District Court for the District of Columbia. Should the State lose its declaratory judgment action, incumbents could nonetheless remain in office for 150 days. 89a. In addition to protecting incumbents, the court modified its order to permit the State to continue to affirmatively implement the statutes that were the subject of the objection. Under the order, the State may fill any vacancies which might occur in the unprecleared positions. 89a-90a.

It is that final order which Plaintiffs challenge. Whatever discretion the court may have possessed before defendants completed their Section 5 submission, that discretion ended with the entry on April 25, 1990 of an objection on the merits. *Perkins v. Matthews*, 400 U.S. 379, 397 (1971); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 182-83 (1985). The court was required to declare the unprecleared election changes null and void, and the judicial positions vacant, as of the date of that objection.

However convenient Defendants may find it to ignore the Attorney General's substantive objection,[3] that

---

[3] The Attorney General's determination, far from carrying "little" or "no weight" (Motion, 15), is legally binding until and unless the District Court for the District of Columbia preclears the changes. S. Rep. No. 97-417, 97th Cong., 2d Sess. 13 (1982). Congress enacted administrative preclearance to provide jurisdictions with a more expeditious route for preclearance than litigation. The Defendants' characterization of

(Continued on following page)

objection changed the rules on relief. Having been afforded time to obtain administrative preclearance[4] and having failed, the State is not entitled to any further extensions.

III. VINDICATION OF SECTION 5 BENEFITS ALL PROTECTED PERSONS, INCLUDING THE INSTANT PLAINTIFFS

Defendants assert that the relief sought by Plaintiffs and required by law would "not provide any benefit to the plaintiffs," and would instead result in harm to "all citizens of the State of Georgia, both black and white . . . " (Motion, 12). Neither is true, as a matter of fact or law.

Congress, in enacting and extending the Voting Rights Act, conclusively determined that the preclearance requirements of Section 5 are necessary to protect equal voting rights for *all* citizens. In reviewing (and upholding) the stringent preclearance provisions of Section 5,

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(Continued from previous page)

the administrative process as an "after-thought," to be used only in "simple, noncontroversial cases," is refuted both by the legislative history and by the fact that the State itself chose to seek administrative preclearance of these changes, rather than filing an action in the District of Columbia.

[4] Defendants have also had sufficient time to change the objectionable features of these new judgeships, and have declined to do so. The General Assembly convened in Special Session in 1989, and in General Session in January 1990. Although bills were introduced to alter the method of judicial election, no action was taken, other than to enact additional judgeships under the same challenged system.

this Court examined the legislative history, and found that

> Congress sought to achieve this goal [of preventing the institution of laws with a discriminatory purpose or effect] by relying upon the voluntary submission by affected States and subdivisions of all changes in such laws before enforcing them. Failure of the affected governments to comply with the statutory requirement would nullify the entire scheme since the Department of Justice does not have the resources to police effectively all the States and subdivisions covered by the Act . . .

Perkins v. Matthews, supra, 400 U.S. at 396-97, citing *Allen v. State Board of Elections,* 393 U.S. 544, 556 (1969). Permitting unprecleared judges to remain in office seriously erodes the *pre*clearance requirements of Section 5 and places the burden of voting rights enforcement squarely on the shoulders of minority citizens, in violation of the clear Congressional intent to relieve them of that burden. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). Conversely, declaring the unprecleared positions vacant and void confirms that the requirements of Section 5 remain in full force and effect and must be obeyed.

Further, contrary to Defendants' assertion, the district court's remedial order, which permits incumbents to remain in office indefinitely, affirmatively injures Georgia's black citizens. Far from "guarantee[ing] against even the most remote possibility of voting discrimination" (Motion, 12), such an order indefinitely extends the terms of judges elected under a sytem deemed by the United States Attorney General to be intentionally discriminatory against black voters. For those judges to

remain in office *beyond* their elected term compounds the discriminatory effect,[5] and precludes black voters from having *any* voice in who holds that elected office.

Finally, the only reason the State is in a position to urge that enforcement of Section 5 would work a "tremendous disruption" and harm Georgia's citizens is because it has openly violated the Voting Rights Act, implementing some 48 judgeships without preclearance.[6] Whatever hardship may result to the State is its own doing.[7] To hold that a State may improve its remedial position by violating established law would make a mockery of the preclearance requirements themselves, and would encourage and reward intransigence.

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[5] For example, the Stone Mountain Judicial Circuit, which consists of DeKalb County, has eight superior court judgeships, four of which were created between 1965 and 1988. In 1980, the circuit was 28% black, and is now projected to be over 30% black. However, each of the eight judges, elected county-wide, is white.

[6] The State clearly knew judicial elections were covered under Section 5. In 1968, the State submitted a change in the state constitution, providing that superior court judges would be elected by the electorate of the circuit, instead of statewide. More recently, in 1983, the State sought and obtained preclearance of the change from partisan to non-partisan elections for superior court judges.

[7] Further, as Plaintiffs pointed out in their Application for Injunction Pending Appeal, any resulting hardship could be avoided by requiring the three-judge court to design an interim election plan which would cure the features found objectionable by the Attorney General. See A-14, 19-20.

CONCLUSION

The remedial aspects of the district court's orders must be reversed and the case remanded for the entry of an appropriate and effective remedy.

Respectfully submitted,

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